Supreme Court, U.S.
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No. 06-

IN THE

Supreme Court of the United States

DETROIT INTERNATIONAL BRIDGE COMPANY,
Petitioner,

v.

UNITED STATES,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether requiring courts to apply the interest rate set in the Declaration of Taking Act, 40 U.S.C. § 3116, to determine the compensation due when the government delays payment of just compensation for private property taken under the Act violates the Just Compensation Clause and the separation of powers when applying the statutory interest rate would materially undercompensate the landowner.

2. Whether a court's reduction of the amount of compensation paid to a property owner based on the fact that the intended taking had been made public at the time the owner purchased the property contravenes this Court's repeated holding that the just compensation due to a landowner under the Fifth Amendment is not to be affected by the government's decision to condemn the property.

RULE 29.6 STATEMENT

Petitioner Detroit International Bridge Company is wholly owned by Centra, Inc., a privately held corporation. No publicly held company owns 10% or more of Detroit International Bridge Company's stock.

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1 Orgel, Lewis, *Valuation Under Eminent Domain* (2d ed. 1953) 21
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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-15a) is reported at 450 F.3d 205. The district court's decisions (App. 17a-27a and 29a-53a) are reported at 286 F. Supp. 2d 865 and 188 F. Supp. 2d 747.

JURISDICTION

The Sixth Circuit's judgment was entered on June 8, 2006. On August 24, 2006, Petitioner timely filed an application to extend the time to file a petition for a writ of certiorari to November 5, 2006. Justice Stevens granted the application on August 31, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fifth Amendment to the United States Constitution provides in relevant part: "nor shall private property be taken for public use, without just compensation."

2. The Declaration of Taking Act provides in relevant part:

> Interest as part of just compensation
>
> (a) Calculation. The district court shall calculate interest required to be paid under this subchapter as follows:
>
> (1) Period of not more than one year. Where the period for which interest is owed is not more than one year, interest shall be calculated from the date of taking at an annual rate equal to the weekly average one-year constant maturity Treasury yield, as published by the Board of Governors of the Federal Reserve System, for the calendar week preceding the date of taking.
>
> (2) Period of more than one year. Where the period for which interest is owed is more than one year, interest for the first year shall be calculated in accordance with paragraph (1) and interest for each additional year shall be calculated on the amount by which the award of compensation is more than the deposit referred to in section 3114 of this title, plus accrued interest, at an annual rate equal to the weekly average one-year constant maturity Treasury yield, as published by the Board of Governors of the Federal Reserve System, for the calendar week preceding the beginning of each additional year.

40 U.S.C. § 3116.[1]

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[1] This provision was previously codified at 40 U.S.C. § 258e-1.

INTRODUCTION AND STATEMENT OF THE CASE

This case concerns petitioner Detroit International Bridge Company's (DIBCO) longstanding pursuit of just compensation for the federal government's 1979 condemnation of two parcels of DIBCO's property. The petition implicates not only the Fifth Amendment's Just Compensation Clause but also basic principles of separation of powers. It asks both which branch of government bears responsibility for determining just compensation and how that determination is to be made.

When payment of just compensation is delayed, interest is constitutionally required. This Court has long held that the courts, not Congress, must have the final say in determining just compensation. Contrary to that established principle and decisions in three other circuits, the Sixth Circuit here held that Congress may, through the Declaration of Taking Act, dictate to the courts the amount of the interest portion of just compensation. This Court should grant the petition to resolve the split among the courts of appeals created by the Sixth Circuit on this fundamental and recurring legal question.

The petition also asks this Court to correct the Sixth Circuit's determination that courts may use the fact that the government had made its planned taking public at the time the property owner acquired the property to reduce the valuation of the taken property. This Court has long made clear that a taking itself may not be considered in determining valuation for purposes of just compensation. The decision below directly contravenes this longstanding principle and creates a regime in which property owners are harmed and the government is improperly given a windfall.

The rule established by the court below would provide the government with the means to deny landowners just compensation whenever the government condemns private property under the Declaration of Taking Act. Under the Sixth Circuit's holding, the government can undervalue land at the time of the condemnation and then put off payment of the deficiency. No matter how many years (or decades, as in

this case) the government delays payment, its interest exposure will be limited to the rate on a one-year Treasury bond. The government can also drive down the valuation of the taken property in certain circumstances by making its plans known in advance. These two tools, which the decision below would place in the government's hands, would enable the government to escape its constitutional obligation to pay just compensation, as it has done in this case.

1. DIBCO owns the Ambassador Bridge connecting the United States with Canada, as well as the bridge plaza on the U.S. side. By 1970 the plaza, built in 1929, had become too small to accommodate the bridge traffic, producing long delays that reduced DIBCO's revenues. The traffic conditions were caused in large part by the Customs Service, which required, depending on circumstances, that 80 percent of the trucks on the bridge park and submit to secondary inspections. App. 113a-114a. An employee parking lot, duty-free shops, and duty-free warehouses located on the bridge added to the congestion.

To increase the value of its bridge operations, DIBCO sought to alleviate the crowding by purchasing additional plots of land nearby. Additional land would permit DIBCO to expand its bridge activities, shifting some operations to the new parcels and thus providing more space on the plaza and increasing traffic flow. In the early 1970s, as part of its ongoing efforts to acquire additional property, DIBCO commenced negotiations to acquire two parcels of land. It alerted the General Services Administration (GSA) of its plans and GSA reacted favorably. App. 88a, 99a-100a, 119a-122a. GSA and DIBCO entered negotiations over a plan under which the Customs Service would lease the new property for secondary truck inspections. App. 88a.

In June 1976 GSA submitted a prospectus to Congress seeking authorization and funding for the condemnation of three parcels of land, including the two being purchased by DIBCO. App. 55a-65a. Congress had taken no action on the prospectus and condemnation was not inevitable when DIBCO purchased the land in 1976 and took possession of it

in July 1977. App. 93a-99a, 120a. Even after Congress approved the plan in the fall of 1977 and as late as January 1979, GSA was considering alternate plans that would not have required condemnation of DIBCO's land. App. 84a-85a, 102a-104a, 106a-110a. In late 1979 GSA, acting for the Customs Service, initiated a condemnation action pursuant to the Declaration of Taking Act that included DIBCO's two parcels. App. 67a-73a.

2. The Declaration of Taking Act, enacted in 1931, provides one means by which the federal government may condemn private property for public use. Under the Act, the government files a declaration of taking for the use of the United States. 40 U.S.C. § 3114. The land is deemed taken and title vests immediately with the government, which is required to deposit with the court an amount of money estimated to equal the value of the land. *Id.* The landowner may challenge that amount in court and, if successful, will be awarded the difference between the adjudicated value and the amount already paid. *Id.* The government relies on the Act frequently. For example, in the last year alone, the government initiated at least 35 actions under the Act.

When the GSA took possession of DIBCO's two parcels of land, it valued them together at $828,000—despite the fact that three years earlier DIBCO had paid approximately $1.2 million to acquire the larger parcel alone. App. 120a. The government deposited $828,000 with the court and this was disbursed to DIBCO in 1980. A protracted attempt to settle the condemnation action failed, and in 2002 the condemnation action went to trial.

3. a. At trial the parties disputed how to determine the just compensation guaranteed by the Fifth Amendment. With limited exceptions, just compensation is the "amount of the market value of the property on the date it is appropriated." *Brown* v. *Legal Found.*, 538 U.S. 216, 243 (2003) (citing *United States* v. *50 Acres of Land*, 469 U.S. 24, 29

(1984)).[2] The value of the land is determined by considering all uses for which the land is "suitable." *Olson* v. *United States*, 292 U.S. 246, 255 (1934). A use of the land in combination with other land may be considered so long as "the possibility of combination is reasonably sufficient to affect market value." *Id.* at 256. In cases involving "partial takings," the landowner is entitled to additional compensation based on the reduction in value caused by the taking to the landowner's remaining land. *See Bauman* v. *Ross*, 167 U.S. 548, 574 (1897).[3] For such "partial takings" damages, it must be the case that "in the reasonably foreseeable future there is a reasonable probability that the lands in question would be dedicated to their highest and best use in combination with the main tract so as to affect their market value." 4A Julius L. Sackman & Philip Rohan, *Nichols on Eminent Domain*, § 14B.03[4][b] (1995); *see also Baetjer* v. *United States*, 143 F.2d 391, 394-395 (1st Cir. 1944).

DIBCO attempted to introduce a variety of valuation theories, under which compensation, before interest, ranged from $8-$16 million. App. 129a-131a, 132a-133a. Among other methods, DIBCO sought to value the taken parcels based on their highest and most profitable use in combination with the bridge operations—the purpose behind the purchase of the parcels. DIBCO also sought to present evidence regarding damages for a partial taking and thus to receive compensation for the decrease in value to the bridge and plaza resulting from the taking.

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[2] "Other measures of 'just compensation' are employed only 'when market value [is] too difficult to find, or when its application would result in manifest injustice to owner or public . . . .'" *Kirby Forest Indus., Inc.* v. *United States*, 467 U.S. 1, 10 n.14 (1984) (alterations in original) (citation omitted).

[3] *See also* 4A Julius L. Sackman & Philip Rohan, *Nichols on Eminent Domain*, § 14.02[1][a] (1995) ("[I]t is a touchstone of all taking procedure that the just compensation required by the Fifth Amendment of the Constitution of the United States requires that an owner in a partial taking case be compensated not only for the land taken, but for the incidental injury to the part not taken.").

The district court refused to permit evidence regarding either of these valuation theories to go to the jury.[4] App. 40a-48a. The court found that DIBCO would need to satisfy the same standard under either valuation theory: a "reasonable probability of [the] condemned property being combined with other tracts in the reasonably near future for some unitary use." App. 40a, 44a. Relying on *United States* v. *Mattox*, 375 F.2d 461 (4th Cir. 1967), the court found no reasonable probability of joint use because, in its view, "the Government's intention to take the property was made public prior to the time that DIBCO purchased the parcels of property at issue." App. 47a.[5]

The court did allow DIBCO to adduce for the jury some valuation evidence based on the proximity of the taken parcels to the bridge, but precluded any evidence regarding value of the property as part of the bridge operations. App. 52a. Based on the limited theories the jury was permitted to consider, it valued DIBCO's parcels at $4,098,174.[6]

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[4] Citing *United States* v. *Reynolds*, 397 U.S. 14 (1970), and Fed. R. Civ. P. 71A, the court concluded "that, except for the single issue of just compensation, the trial judge is to decide all issues, legal and factual that may be presented." App. 40a-41a.

[5] Furthermore, according to the court, the proposed combined use required a street currently used by the city and the sale of another parcel of land to DIBCO. App. 40a-41a.; *see infra* n.13.

[6] The district court incorrectly resolved several other issues that were appealed to, but not ruled upon by, the Sixth Circuit, and therefore are not properly before this Court.

The court determined, for example, that the combined-use valuation theory could rest only on the use of the taken parcels for secondary truck inspections by the Customs Service, and it disallowed that valuation because, in the court's view, the value was created by the government. App. 48a-49a. That value-from-the-government holding neglected the other combined uses proposed by DIBCO, such as using the parcels for duty-free shopping or warehouses. The court rejected DIBCO's highest-and-best-use and partial-taking valuation on the alternate ground that the proposed combined use was "special" or "unique" to DIBCO and thus non-compensable. App. 49a-52a. But that holding rested on a fundamental misapprehension of the unique-use doctrine, which bars only values that

b. Following trial, the court requested briefing on the question of the interest due on the deficiency—the difference between the jury award and the amount the government had already paid. App. 53a-54a. Because the Constitution's requirement for just compensation is "comprehensive and includes all elements," "no specific command to include interest is necessary when interest or its equivalent is a part of such compensation." *Seaboard Air Line Ry. Co.* v. *United States*, 261 U.S. 299, 306 (1923). Thus, interest is constitutionally required when payment of just compensation is delayed. *Kirby Forest Indus., Inc.* v. *United States*, 467 U.S. 1, 10 (1984) ("[T]he owner is entitled to interest thereon sufficient to ensure that he is placed in as good a position pecuniarily as he would have occupied if the payment had coincided with the appropriation.").

The parties disputed whether, in the circumstances of this exceptional case, the court was required to apply the

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are relevant solely to a particular landowner, such as sentimental uses that the market would not value. *See, e.g., United States* v. *Miller*, 317 U.S. 369, 375 (1943). The combined use DIBCO proposed does not fit in this category—*any* potential owner of the bridge and the taken parcels would value the parcels' use in combination as a way of increasing the bridge revenues. *Cf. Olson*, 292 U.S. at 256-257 ("There must be a reasonable possibility that the owner could use [the taken tract] together with the other [lands] *or that another could acquire all lands or easements necessary for that use.*" (emphasis added)).

Separately, the district court rejected DIBCO's request for additional compensation under a severance damages theory (which the court distinguished from partial-taking damages) on the grounds that severance damages require unity of use at the time of the taking (rather than a reasonable probability of unity of use in the reasonably near future) and that unity of use did not exist here. App. 30a-38a. The court's requirement of unity of use at the time of the taking was legally erroneous. *See, e.g., Baetjer*, 143 F.2d at 394 (for purposes of determining severance damages, land constitutes a single tract "if put to an integrated unitary use or even if the possibility of their being so combined in use 'in the reasonably near future' . . . is reasonably sufficient to affect market value." (citation omitted)). This point too was not addressed by the Sixth Circuit and, in any event, is not an alternative ground for the holdings challenged in the questions presented.

interest rate established in the Declaration of Taking Act, 40 U.S.C. § 3116. The Act originally provided for interest at six percent. *See* Act of Feb. 26, 1931, ch. 307, 46 Stat. 1421. In 1986 the Act was amended to tie the interest rate to the rate on one-year Treasury bonds. For the first year, the rate is the "annual rate equal to the weekly average one-year constant maturity Treasury yield . . . for the calendar week preceding the date of taking." 40 U.S.C. § 3116. For each additional year, the interest rate is likewise tied to the weekly average one-year constant maturity Treasury yield, but the relevant date for determining the relevant rate is the last week of the preceding year. That rate is applied to the deficiency plus accrued interest. *Id.*

The government argued that the court should apply the statutory rate, regardless of the amount of time that had passed and the magnitude of the deficiency in the government's initial payment. That rate provided interest of approximately $12.8 million. DIBCO argued that the statutory rate was not constitutionally sufficient and proposed several alternatives. These alternate rates ranged from longer-term government bonds to indices of corporate bonds and yielded interest payments above $20 million. App. 75a-77a, 79a-80a.

The district court determined that the Declaration of Taking Act's interest rate represented Congress's conclusive determination—binding on the courts—as to the just compensation due. App. 24a-25a. The court acknowledged a contrary holding by the Ninth Circuit in *United States* v. *50.50 Acres of Land*, 931 F.2d 1349 (9th Cir. 1991). But it concluded that the Ninth Circuit had incorrectly relied on earlier decisions concerning the former flat six-percent rate. App. 24a. The court also asserted that the statutory rate "provides DIBCO with what a reasonable and prudent investor would earn while investing though guaranteeing the safety of the principal." App. 26a.

The government ultimately paid DIBCO $15,683,327 to satisfy the judgment. This amount included the deficiency—the difference between what the government had paid and

the jury's valuation amount—and the interest due on that amount.

4. The court of appeals affirmed, addressing only some of the issues raised on appeal. App. 1a-15a.

After outlining the dispute over the highest-and-best-use valuation method and partial-taking damages, the Sixth Circuit "acknowledge[d] that this is a close question," but held that "it is for the judge to tell the jury the criteria it must follow in determining what amounts will constitute just compensation." App. 11a. It found no error either in the district court's "factual findings or in their application to the subsequent jury instructions." *Id.* On the interest-rate question, the court discerned no "clear error" in the "district court's adoption of the statutorily required rate." App. 15a. Accordingly, the court explained, "in light of the 'reasonably prudent investor' standard, we decline to reverse the district court's decision with respect to interest rates." *Id.*

REASONS FOR GRANTING THE WRIT

This petition presents the fundamental question whether the Constitution assigns to federal courts or Congress the determination of just compensation. The courts of appeals are clearly divided over the question in the context of whether courts, regardless of circumstances, must inexorably apply the interest rate set by Congress in the Declaration of Taking Act. The Sixth Circuit's decision brings it into conflict with three other courts of appeals and this Court's longstanding precedents concerning the courts' controlling role in determining what compensation is "just." The circumstances of this case make it a good vehicle to resolve the disagreement. The large size of the deficiency in the initial government payment and the more than 20-year delay in resolution dramatically demonstrate that a congressionally-mandated one-size-fits-all approach to interest will not provide the constitutionally guaranteed just compensation in every case. Indeed, the Sixth Circuit's holding provides the government a powerful means to game the system by ten-

dering an inadequate payment upon condemnation and then delaying ultimate adjudication.

This petition also asks the Court to reaffirm that the government's own condemnation plans may not be used to reduce a property's valuation for just compensation purposes. This Court has repeatedly held that just compensation is measured by the market value of the property, that market value assumes the property has not been taken, and that therefore the government's taking may not affect the valuation. The decision below is part of a trend among lower courts that deviates from these basic propositions and permits property owners to receive less than the just compensation to which they are constitutionally entitled, while providing the government with a windfall of its own creation. The Court should grant the petition in order to correct this development in the lower courts.

I. THE HOLDING THAT, REGARDLESS OF CIRCUMSTANCES, COURTS MUST INEXORABLY APPLY THE INTEREST RATE ESTABLISHED IN THE DECLARATION OF TAKING ACT CREATES A CIRCUIT SPLIT, IS IN TENSION WITH THIS COURT'S PRECEDENTS, VIOLATES THE FIFTH AMENDMENT AND THE CONSTITUTIONAL SEPARATION OF POWERS, AND FAILS TO PROVIDE JUST COMPENSATION IN THIS CASE

A. There Is A Circuit Split On The Question Whether Courts Must Always Apply The Interest Rate Set By The Declaration Of Taking Act

Since 1931 the Declaration of Taking Act has purported to set the interest rate applicable when payment of just compensation is delayed. In the ensuing 75 years, every circuit but one to consider the question whether courts are bound to apply the statutory rate regardless of the circumstances has said "no." Three circuits addressed the question under the Act as originally enacted, which provided for a flat

six-percent rate.[7] Two have addressed the question based on the amended Act, which ties the rate to the rate on one-year Treasury bonds.[8] Only the court below has concluded that courts must defer to Congress in calculating the interest due as just compensation for a taking.

In *United States* v. *Blankinship*, 543 F.2d 1272 (9th Cir. 1976), the Ninth Circuit considered whether courts must apply the interest rate set in the Declaration of Taking Act. Following this Court's precedents, the court noted that the Fifth Amendment's just-compensation requirement means that the "owner shall be put in as good position pecuniarily as he would have been if his property had not been taken." *Id.* at 1275 (citation omitted). Again abiding by this Court's holdings, it found that " '[j]ust compensation' requires that the owners of the land be compensated for the delay" in payment of compensation. *Id.* Thus, the court concluded (*id.* at 1276) that the

> figure employed by Congress in the Declaration of Taking Act cannot be viewed as a ceiling on the rate of interest allowable in computing just compensation with respect to a deficiency. It will, of course, operate as a floor. No lesser rate than 6 percent is consistent with the intent of Congress; a rate no greater than 6 percent in some instances will contravene the Fifth Amendment.

Other circuits followed suit. The First Circuit, citing *Blankinship*, held that the rate in the Declaration of Taking Act "cannot . . . constitute a ceiling, although it constitutes a floor." *United States* v. *125.2 Acres of Land, More or Less,*

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[7] *United States* v. *125.2 Acres of Land, More or Less, Situated in the Town and County of Nantucket, Mass.*, 732 F.2d 239, 244-245 (1st Cir. 1984); *United States* v. *329.73 Acres of Land Situated in Grenada and Yalobusha Counties, Miss.*, 704 F.2d 800, 812 (5th Cir. 1983) (en banc); *Blankinship*, 543 F.2d at 1274 .

[8] These circuit courts are the Sixth Circuit in this case (App. 11a-15a) and the Ninth Circuit in *United States* v. *50.50 Acres of Land*, 931 F.2d 1349, 1355-1356 (9th Cir. 1991).

Situated in the Town and County of Nantucket, Mass., 732 F.2d 239, 245 (1st Cir. 1984). That court remanded for consideration of the appropriate interest rate and expressly noted that the rate "may exceed the six percent statutory rate." *Id.* Addressing this question en banc, the Fifth Circuit likewise held that "[w]e agree with the decisions of other federal appellate courts that the 6% delay damages provided by the Declaration of Taking Act, . . . and by other federal condemnation statutes, sets a floor, rather than a ceiling, on the rate of interest payable on the deficiency." *United States* v. *329.73 Acres of Land Situated in Grenada and Yalobusha Counties, Miss.*, 704 F.2d 800, 812 (5th Cir. 1983) (en banc).

Other lower courts have reached like conclusions. For example, in *United States* v. *319.46 Acres of Land, More or Less, Situate in Cotton and Jefferson Counties*, 508 F. Supp. 288 (W.D. Okla. 1981), the court explained that because the "obligation of the United States to pay just compensation for a taking arises not from [the Act]" but rather from the Fifth Amendment, the "statutory right" under the Act "cannot be used to divest the landowner of his right to just compensation as provided by the Constitution." *Id.* at 289-290; *see also United States* v. *97.19 Acres, More or Less, Located in Montgomery, Washington, and Allegany Counties, Md.*, 511 F. Supp. 565, 567 (D. Md. 1981) ("This Court has consistently followed *Blankinship* in declaration of taking cases. *See, e.g., WMATA* v. *One Parcel of Land in Montgomery County, Md., David R. Shaub, et al.*, No. K-78-140 (D. Md. 1979).").

Since the Declaration of Taking Act was amended in 1986, two circuit courts have addressed whether the courts are always required to apply the statutory rate. In *United States* v. *50.50 Acres of Land*, 931 F.2d 1349, 1355 (9th Cir. 1991), the Ninth Circuit reassessed the statutory interest-rate question in light of the 1986 amendments. Quoting this Court's decision in *Monongahela Navigation Co.* v. *United States*, 148 U.S. 312, 327 (1893), the Ninth Circuit explained that just compensation " 'is a judicial, and not a legislative

question. . . . [W]hen the taking has been ordered, then the question of compensation is judicial. . . . The constitution has declared that just compensation shall be paid, and the ascertainment of that is a judicial inquiry.' " *50.50 Acres of Land*, 931 F.2d at 1355 (alteration added). And the court concluded that "nothing in the new statute can change the Supreme Court's determination that just compensation 'is a judicial[,] not a legislative[,]' function." *Id.* at 1355-1356 (quoting *Monongahela Navigation Co.*, 148 U.S. at 327 (alterations in original)). Furthermore, the court found, although "the new statute attempts to create a variable interest rate reflective of market changes, it is based only on one-year Treasury bill rates." *Id.* at 1356. The Ninth Circuit held that courts must determine first "whether the new statutory formula provides a 'proper and reasonable' interest rate." *Id.* If it does not, then courts must apply an "interest rate based on evidence of a diverse group of securities, including Treasury bills." *Id.*

That holding, like the earlier decisions of the First, Fifth, and Ninth Circuits, directly conflicts with the Sixth Circuit's decision in this case (App. 15a) that the statutory rate is mandatory. For those earlier decisions rejecting the mandatory character of the statutory rate in no way turned on the particular rate selected by Congress. This Court should grant the petition to resolve the division in the lower courts over the fundamental and recurring issue of whether the Constitution assigns to the federal courts or Congress the final say in determining the interest component of just compensation.

B. The Decision Below Conflicts With This Court's Precedents And Fundamental Principles Of Separation Of Powers

Review is particularly warranted because the Sixth Circuit's holding contravenes this Court's longstanding precedents about the Constitution's allocation of authority to the courts and Congress. This Court has made clear that the Constitution requires the courts, not the legislature, to de-

termine what constitutes "just compensation" in any particular case.

Although this Court has not previously decided the precise question presented here, it has expressed approval for the position taken by several courts of appeals and repudiated by the Sixth Circuit here. In *Kirby Forest Indus., Inc.* v. *United States*, 467 U.S. 1, 10 (1984), the Court cited the "principle" that in cases where "disbursement of the award is delayed, the owner is entitled to interest thereon sufficient to ensure that he is placed in as good a position pecuniarily as he would have occupied if the payment had coincided with the appropriation."[9] The Court noted that this "principle underlies the provision in [the Declaration of Taking Act] for the payment of interest on any difference between the estimated value of land appropriated through a declaration of taking and its subsequently adjudicated actual value as of that date." *Id.* n.16. Furthermore, the Court explained, "[t]he principle also underlies several decisions by Courts of Appeals, holding that the six-percent rate of interest prescribed by [the Declaration of Taking Act] is not a ceiling on the amount that can and must be paid by the Government." *Id.* (citing *329.73 Acres of Land*, 704 F.2d at 812 & n.18)).

The Court's apparent approval in *Kirby Forest Industries* of the principle that Congress may not dictate to the courts the measure of just compensation accords with older precedents and flows directly from the role of the courts as the ultimate arbiters of the Constitution's meaning. More than 100 years ago, in *Monongahela Navigation Co.*, 148 U.S. at 327, this Court emphatically explained that it is the role of courts rather than Congress to determine just com-

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[9] *See also Seaboard Air Line Ry. Co.* v. *United States*, 261 U.S. 299, 306 (1923) ("Where the United States condemns and takes possession of land before ascertaining or paying compensation, the owner is not limited to the value of the property at the time of the taking; he is entitled to such addition as will produce the full equivalent of that value paid contemporaneously with the taking. Interest at a proper rate is a good measure by which to ascertain the amount so to be added.").

pensation. At issue in that case was a federal statute that provided for the condemnation of a lock and dam and specified the amount of compensation that would be offered. This Court invalidated the statute and explained (*id.*):

> By this legislation congress seems to have assumed the right to determine what shall be the measure of compensation. But this is a judicial, and not a legislative, question. The legislature may determine what private property is needed for public purposes; that is a question of a political and legislative character. But when the taking has been ordered, then the question of compensation is judicial. It does not rest with the public, taking the property, through congress or the legislature, its representative, to say what compensation shall be paid, or even what shall be the rule of compensation. The constitution has declared that just compensation shall be paid, and the ascertainment of that is a judicial inquiry.

The holding in *Monongahela Navigation Co.* rests on the constitutional axiom that "[t]hose who apply the rule to particular cases, must of necessity expound and interpret that rule." *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). The authority of the federal courts extends to all cases arising under the Constitution and presupposes the ability of the courts to "look[] into" and "examin[e]" the Constitution. *Id.* at 179. The Constitution requires "just compensation" when the government takes private property for public use. Interest, as this Court held in *Seaboard Air Line Ry. Co.* v. *United States*, 261 U.S. 299, 306 (1923), and confirmed in *Kirby Forest Industries*, 467 U.S. at 10, is a component of just compensation. Just as courts need not defer to Congress's attempts to "alter the meaning of the Free Exercise Clause," *City of Boerne* v. *Flores*, 521 U.S. 507, 519 (1997), determine the scope of congressional authority under the Commerce Clause, *see United States* v. *Lopez*, 514 U.S. 549, 562-563 (1995), or define the "substantive meaning" of the Fourteenth Amendment, *Kimel* v. *Florida Bd. of Re-*

gents, 528 U.S. 62, 81 (2000), so too courts are not required to accede to Congress's determination of the interest component of just compensation when doing so would fail to provide just compensation. This Court should grant the petition in order to reaffirm the judiciary's ultimate authority and obligation to determine just compensation.

C. Applying The Statutory Rate Dramatically Undercompensates The Landowner In This Case

If one could be assured that the rate set by Congress would necessarily provide just compensation in every case, then the question presented could perhaps be regarded as purely theoretical. And under the paradigm contemplated by the Declaration of Taking Act, the interest component of a just compensation award is often fairly incidental—a rate applied on a presumably small portion of the total valuation for a relatively short period of time.[10] Here, however, the amount of the deficiency—more than $3 million—is more than three times the government's original valuation amount. And payment of that amount was delayed for more than 20 years. The interest rate in this case will therefore determine the bulk of the compensation that DIBCO receives.

This Court has always considered just compensation based on the circumstances of the case—the property at issue, the date of the taking, and other factors. *See, e.g.*, *United States* v. *Cors*, 337 U.S. 325, 332 (1949) ("The Court in its construction of the constitutional provision has been careful not to reduce the concept of 'just compensation' to a formula."); *cf. Almota Farmers Elevator & Warehouse Co.* v. *United States*, 409 U.S. 470, 483 (1973) ("The notion of 'fair

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[10] *Cf. Tulare Lake Basin Water Storage Dist.* v. *United States*, 61 Fed. Cl. 624, 629-630 (2004) ("The purpose of the act, in other words, is to provide compensation to the property owner in situations where the government exercises its power of eminent domain and payment is expected to follow quickly from the taking, rather than in situations where, as here, a significant amount of time has elapsed between the taking of the property and the payment of just compensation.").

market value' is not a universal formula for determining just compensation under the Fifth Amendment."). The interest payment is meant to make the landowner whole—to return him to the position he would have been in if the payment had been received on time. Thus, courts have looked to what "a reasonably prudent person investing in funds so as to produce a reasonable return while maintaining safety of principal would receive." *United States* v. *429.59 Acres of Land*, 612 F.2d 459, 465 (9th Cir. 1980) (citation omitted); *see Washington Metro. Area Transit Auth.* v. *One Parcel Of Land in Montgomery County, Md.*, 706 F.2d 1312, 1322 (4th Cir. 1983). More specifically, courts have found that "[b]ecause a reasonably prudent investor would diversify his risk, it is proper to consider the rate of interest paid on different types of securities with different maturities." *429.59 Acres of Land*, 612 F.2d at 465.

A one-year Treasury rate is not what a "reasonably prudent investor" would receive on an investment exceeding 20 years. The Treasury rate reflects the government's cost of borrowing for a year. *Cf. Boston Chamber of Commerce* v. *City of Boston*, 217 U.S. 189, 195 (1910) ("[T]he question is, What has the owner lost? not, What has the taker gained?"). As a gauge of return on investment, the one-year Treasury bond constitutes a conservative, virtually risk-free, short-term investment. Its yield is thus quite low relative to investments with longer maturities, lesser liquidity, or higher risk. Even assuming, *arguendo*, that the one-year Treasury bond rate might be an acceptable proxy for a reasonably prudent investor's one-year investment, it is not sufficient to provide a rate of return on a 20-year investment. The yields on other government bonds reveal why this is so; a 20-year bond, which ties up capital for longer, typically commands higher yields. An investor with a 20-year time horizon is, by definition, less interested in liquidity and has greater flexibility to invest in securities of different maturities. Because of these considerations, even keeping risk low, it is unlikely that short-term, low-yield bonds would provide adequate

returns over an extended period for a reasonably prudent investor.[11] Accordingly, if the government delays payment for many years, the property owner will not be made whole if interest is inexorably tied to short-term rates.

Here, DIBCO sought to present evidence regarding the impact of different interest rates and the propriety of a rate higher than the statutory rate. All of the rates it proposed would have yielded payments at least 50% higher than that based on the statutory rate (which yielded approximately $13 million). For example, in light of the more than 20-year delay, DIBCO proposed the rate on a 20-year or 30-year Treasury bond. These rates would have yielded approximately $37 million and $41 million in interest payments respectively. App. 75a-77a, 79a-80a. DIBCO also presented evidence based on several Moody's corporate bond indices. These indices would have yielded between $ 20.5 million and $27 million. App. 75a-77a.

The district court refused to conduct a hearing on the interest-rate question. Instead, it held that it was bound by the statutory rate. Although the court announced blankly that the statutory rate was constitutionally sufficient in this case, it offered no relevant analysis to support that assertion, which was clearly erroneous for the reasons just given. The court of appeals agreed that the statutory rate was binding. Like the district court, it asserted that the statu-

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[11] *See, e.g.*, Dave Kansas, *The Wall Street Journal: Complete Money and Investing Guidebook* 73 (2005) ("The interest rates paid by Treasur[ies] (and other nongovernment bonds) tend to be higher for longer-duration bonds and lower for shorter-duration bonds. This is because the longer you hold an investment, the greater the implied risk, and thus the investor demand for higher returns."); Richard A. Brealey et al., *Principles of Corporate Finance* 632, 638 (8th ed. 2006) (observing that "since 1900 long-term government bonds have provided a higher average return than short-term bills" and explaining the "liquidity-preference theory" under which investors demand "the compensation of a higher expected return" in exchange for the risk implicated by a longer-term investment).

tory rate was constitutionally sufficient in this case, but offered no support for that conclusion. App. 15a.

Because of the large deficiency in compensation proffered and the extremely long delay in payment of the balance, the rate mandated by Congress plainly fails to provide DIBCO with just compensation. Remand would provide the opportunity for the full consideration of the interest component of the just compensation DIBCO is due.

II. THE HOLDING THAT THE GOVERNMENT'S PLANNED TAKING ELIMINATES VALUATION METHODOLOGIES BASED ON A COMBINED USE OF THE LAND IS IN TENSION WITH THIS COURT'S LONGSTANDING PRECEDENTS AND THREATENS BASIC PRINCIPLES OF JUST COMPENSATION

This Court has long held that the compensation required by the Fifth Amendment is not affected by the government's decision to condemn the property. The Sixth Circuit's holding contravenes that principle because it permits the government's taking to constrain the valuation options for the property, thus reducing the compensation the owner receives. This Court's decisions were by and large ones in which allowing the taking to influence valuation would have benefited the property owner. It is particularly troubling and unfair that the Sixth Circuit violated this principle in a case where factoring in the taking harms the property owner by reducing the valuation of the taken property.

A. The Sixth Circuit's Decision Conflicts With This Court's Repeated Holding That A Taking May Not Affect The Amount Of Compensation Due

"In giving content to the just compensation requirement of the Fifth Amendment, this Court has sought to put the owner of condemned property 'in as good a position pecuniarily as if his property had not been taken.'" *United States* v. *564.54 Acres of Land, More or Less, Situated in Monroe and Pike Counties, Pa.*, 441 U.S. 506, 510 (1979) (quoting *Olson*, 292 U.S. at 255). Thus, the landowner must be paid the "amount of the market value of the property on the date it is appropriated." *Brown* v. *Legal Found.*, 538 U.S. 216,

243 (2003) (citing *United States* v. *50 Acres of Land*, 469 U.S. 24, 29 (1984)).

That approach assumes that the property is *not* being taken. In *City of New York* v. *Sage*, 239 U.S. 57, 61 (1915), for example, the Court explained that for purposes of determining market value a proposed use may be considered "only so far as the public would have considered it if the land had been offered for sale in the absence of the city's exercise of the power of eminent domain." *See also Olson* v. *United States*, 292 U.S. 246, 256 (1934). What the public *would have paid* is the measure of what the government must pay.

Consistent with the principle that market valuation assumes there is no taking, the Court has repeatedly held that any increase in value resulting from the taking may not be considered in determining just compensation. In *Olson*, for example, the Court explained that "the value to be ascertained does not include, and the owner is not entitled to compensation for, any element resulting subsequently to or because of the taking." 292 U.S. at 256; *see also Cors*, 337 U.S. at 332 ("[W]here the government lays out a project involving the taking of lands, no increment of value arising by virtue of the fact that a particular tract is clearly or probably within the project may be added."); *United States* v. *Miller*, 317 U.S. 369, 377 (1943) ("[T]he Government ought not to pay any increase in value arising from the known fact that the lands probably would be condemned. The owners ought not to gain by speculating on probable increase in value due to the Government's activities").

Just as courts must exclude appreciation in value that may result from a taking, so too they must also exclude depreciation. As this Court explained in *United States* v. *Virginia Elec. & Power Co.*, 365 U.S. 624 (1961):

> The court must exclude any depreciation in value caused by the prospective taking once the Government "was committed" to the project. . . . As one writer has pointed out, "(i)t would be manifestly unjust to permit a public authority to depreciate property values by a threat . . . (of the construction

> of a government project) and then to take advantage of this depression in the price which it must pay for the property' when eventually condemned."

Id. at 636 (quoting 1 Orgel, Lewis, *Valuation Under Eminent Domain*, § 105, at 447 (2d ed. 1953) (citations omitted)).

Contrary to these precedents, the courts below held that the fact of the taking *does* shape the valuation of the taken property by eliminating certain potential valuation methodologies. The court of appeals affirmed the district court's preclusion of DIBCO's evidence of valuation based on combined use of the taken parcels with the bridge property because it found that the combined use was not reasonably probable. App. 11a; *see* App. 47a-48a.[12] That conclusion rested primarily on the court's finding that the government's plans to condemn the two parcels had been made public before DIBCO acquired the parcels; the impending taking meant that any combined use was not going to happen.[13]

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[12] The Sixth Circuit is not alone in taking this approach. *See United States* v. *99.66 Acres of Land*, 970 F.2d 651, 657 (9th Cir. 1992) ("[W]here a landowner purchases with notice of the intended taking, he may not claim severance damages in a condemnation proceeding."); *United States* v. *Mattox*, 375 F.2d 461, 463-464 (4th Cir. 1967) (finding the integrated use "if not actually impossible at least highly improbable" because the government project was "well under way" at the time the landowner purchased the land in question).

[13] The district court also cited other factors in determining that combined use was not reasonably probable. App. 47a-48a. But the court clearly relied on the fact of the taking as the primary factor in assessing the reasonable probability of the combined use.

Moreover, the other factors cited—the need for two additional parcels, one owned by Detroit and the other by another landowner—affected only one particular combined use. The court's analysis assumed that the combined use would employ the parcels as secondary truck inspection facilities for the Customs Service. App. 47a-48a. But bridge operations could have been extended to the parcels in ways that would not have used them for truck inspections and thus would not have required the additional pieces of land. Although the jury was not permitted to consider this evidence, an expert testified regarding the value of the land as providing additional flexibility for DIBCO to expand or rearrange any of the bridge activities as the circumstances warranted. App. 123a-131a, 139a.

The Sixth Circuit's reliance on the fact of the taking in determining the method of valuation of the taken parcels conflicts with this Court's unwavering direction that the taking is irrelevant to market value and thus must not influence the valuation of property for purposes of just compensation.

By allowing the taking to affect valuation, the Sixth Circuit's approach improperly "permit[s] a public authority to depreciate property values by a threat." *Virginia Elec.*, 365 U.S. at 636 (citation omitted). Under that approach, the fact of the taking eliminated consideration of the parcels' highest and best use and partial-takings damages and thus reduced the amount of compensation. That runs directly counter to *Virginia Electric*'s admonition that courts must exclude "depreciation in value caused by the prospective taking." *Id.*

Olson teaches the same lesson. That case raised the question whether certain potential uses of the condemned property (for power generation) could be considered in determining the property's highest and best use for valuation purposes. The government argued that those uses should be excluded because the taking would eliminate their availability. The Court rejected that argument, observing that "the fact that [the property] may be or is being acquired by eminent domain" is not "negative consideration of availability" of other uses. 292 U.S. at 256. In other words, in valuing the property for compensation purposes, the property's availability for other uses—such as the potential for a combined use—should not be affected by the taking itself.

Accordingly, in valuing the property, the Sixth Circuit should not have considered the fact of the taking, whether directly or indirectly, by allowing the taking to affect the available valuation methodologies. The Court should grant the petition to correct this deviation from the longstanding rule established in its precedents that the fact of a taking may not influence the valuation of property for just compensation.

B. The Decision Below Harms Landowners While Allowing The Government A Windfall Of Its Own Creation

The rule endorsed by the Sixth Circuit allows the government to provide itself a windfall at property owners' expense. The court of appeals may well have been empirically correct to say that, once the government announces an intent to take a piece of land, the impending taking makes the property owner's proposed combined uses not reasonably probable.[14] But the same could be said of every proposed use that a property owner might seek to rely on for valuation purposes. The eventual fact of the taking necessarily renders improbable the property owner's proposed use. In that respect, it makes no difference whether or not the owner was aware of the planned condemnation at the time of the purchase. Under the logical extension of the Sixth Circuit's approach, then—contrary to this Court's precedent—valuation based on possible combined uses would never be possible.

The courts below appear to have been concerned that DIBCO would be overcompensated if full market value were paid as just compensation. Their theory, unstated, appears to have been that because DIBCO purchased the property aware of the potential taking, it would not have paid full market value and thus should not be compensated at that value. But this Court long ago rejected that theory and made clear that the circumstances of the property owner's acquisition of the property are not to be considered. In *Olson*, 292 U.S. at 255, this court explained that valuation, for purposes of just compensation,

> may be more or less than the owner's investment. He may have acquired the property for less than its worth or he may have paid a speculative and exor-

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[14] Ironically, in this case a leading proposed combined use—secondary truck inspections as part of bridge operations—is the precise use to which the government ultimately put the taken parcels. App. 105a.

> bitant price. Its value may have changed substantially while held by him. . . . The public may not by any means confiscate the benefits, or be required to bear the burden, of the owner's bargain.

The government's windfall under the Sixth Circuit's approach becomes particularly evident in a scenario in which two identical pieces of land are being condemned. Assume Parcel A has been owned by the same owner for many years, whereas Parcel B changed hands soon after the government's condemnation intentions became public. The highest and best use of both parcels is in combination with each landowner's other land, and each landowner—barring the taking—would have used the parcels in combination with his other land. For Parcel A, the landowner could seek to value the land based on its highest and best use in combination and could seek partial-takings damages. For Parcel B, however, because it was acquired after the intent to condemn was announced, these valuation methods are not available to the landowner. The government will only be required to compensate the owner for some lesser value of the taken parcels. This means that the government is relieved of its obligation to provide just compensation on Parcel B simply because the property was transferred at a time when the planned taking had been made public. In effect, the government is permitted to diminish Parcel B's value merely by announcing its intent to condemn the land.

Under that rule, the recent purchaser of Parcel B would not be expected to pay full market value for the property; he would discount the value based on the impossibility of the combined use. But that merely means that the government receives a windfall at the expense of the prior owner rather than the purchaser. That prior owner could only avoid shouldering this burden on behalf of the public good by holding the property until the time of the taking. Under the rule established in this Court's precedents, these consequences are avoided. The prior owner will sell the land, and the buyer will pay full value, secure in the knowledge that market value will be paid should the property be condemned.

The government is required to pay market value upon eventual condemnation undiminished by "depreciation in value caused the prospective taking." *Virginia Elec.*, 365 U.S. at 636. Neither burden nor windfall results.

Just compensation is one means by which the government protects the "fullness and sufficiency of the securities which surround the individual in the use and enjoyment of his property." *Olson*, 292 U.S. at 255 (quoting *Monongahela Navigation Co.*, 148 U.S. at 324). This Court has held that just compensation is "'designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'" *Armstrong* v. *United States*, 364 U.S. 40, 49 (1960). The results of the Sixth Circuit's approach—tying the hands of private property owners or forcing them to bear the burdens while the government receives a windfall—are precisely the kinds of harms the Just Compensation Clause was meant to prevent. This Court should grant review to correct this deviation from its longstanding precedents.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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NOVEMBER 2006

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 04-1052

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE,

v.

CERTAIN LAND SITUATED IN THE CITY OF DETROIT, WAYNE COUNTY, STATE OF MICHIGAN; NASH P. SOGOIAN, TREASURER OF THE CITY OF DETROIT, DEFENDANTS,

THE DETROIT INTERNATIONAL BRIDGE COMPANY, DEFENDANT-APPELLANT,

COMMODITIES EXPORT COMPANY, A MICHIGAN CORPORATION AND WALTER H. LUBIENSKI, INTERVENORS.

Argued: Nov. 29, 2005
Decided and Filed: June 8, 2006

[450 F.3d 205]

OPINION

Before NORRIS and BATCHELDER, Circuit Judges; RICE, District Judge*

ALAN E. NORRIS, Circuit Judge.

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* The Honorable Walter H. Rice, United States District Judge for the Southern District of Ohio, sitting by designation.

This appeal represents the culmination of a protracted condemnation proceeding the length of which calls Dickens' *Bleak House* to mind. Detroit International Bridge Company ("DIBCO") appeals from a jury verdict that determined the value of two parcels of land owned by the company and located near the Ambassador Bridge, which connects Detroit to Windsor, Canada. In 1979, the General Services Administration ("GSA"), acting on behalf of the Customs Service, initiated a condemnation action. The crux of this appeal involves a dispute over the proper method of valuing the property at issue, as well as the amount of interest owing on the judgment.

I.

As one might expect, a quarter century of litigation has spawned a number of related judicial opinions. Although the history of this case is extensive, for our purposes the facts as summarized by the district court in 1982 provide a good starting point:

> **[207]** Defendant DIBC[O] owns the Ambassador Bridge connecting the United States with Canada, as well as the current bridge plaza on the U.S. side. The plaza, which was built in 1929, is incapable of handling the heavy traffic load. It is particularly congested because U.S. Customs requires approximately 50 percent of the trucks crossing the bridge to submit to a secondary inspection. This means that these trucks must pull over and park. Prior to the condemnation of the land in question, trucks were required to park on the present plaza to await secondary inspection, causing traffic congestion, long waits, and dangerous conditions.

United States v. *Certain Land Situated in the City of Detroit*, 547 F. Supp. 680, 682 (E.D. Mich. 1982). GSA sought to obtain three parcels of land located near the bridge through eminent domain. *Id.* DIBCO owned two of the par-

cels, which it had acquired in the 1970s with an eye towards alleviating bridge congestion.[1] The larger of the parcels, which it purchased for $1.2 million, had housed a truck terminal used by the previous owner, Overland-Western Corporation.

Before purchasing the Overland parcel, DIBCO informed GSA of its intentions, and the agency responded favorably on behalf of the Customs Service, which contemplated leasing space on the property to carry out secondary inspections. After negotiations between DIBCO and GSA broke down, however, GSA filed a Declaration of Taking in 1979 and took possession of the property in 1980, even though it did not move secondary inspections there until 1982.

Initially, GSA valued the two parcels at $828,000, which DIBCO points out was less than it had paid to acquire the larger parcel three years earlier. In any event, the district court ordered that amount deposited with the clerk of court when GSA assumed control over the property; that sum was paid to DIBCO in February 1980. Since then, the company has sought further compensation through litigation and its attendant settlement negotiations. An opinion of this court issued three years ago picks up the story:

> In 1991, the United States and DIBCO agreed to settle the condemnation proceeding. They agreed to a memorandum of agreement ("MOA") under which the United States agreed to enlarge the scope of its expansion and condemn third party property, including the totality of a lot owned by Commodities Export Co. and Walter H. Lubienski ("Commodities"). DIBCO agreed to compensate the United States for the costs of condemnation. DIBCO claims that the MOA gave it the right to be

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[1] The third parcel, which was owned by Nash Sogoian, separated the parcels owned by DIBCO. It was acquired in the same condemnation proceeding; it is not at issue in this appeal.

> consulted regarding the costs of condemnation, and that it only required DIBCO to pay condemnation costs that were reasonable in light of federal regulations.
>
> In 1996, the United States brought a condemnation action against Commodities. DIBCO's counsel was in attendance at conferences in that action at which the United States indicated that it would not seek to condemn the entirety of Commodities' land. DIBCO regarded the failure to condemn all of Commodities' land as a breach of the MOA, but it did not seek to intervene in this condemnation proceeding. Instead, DIBCO sought to reopen the 1979 condemnation action on the grounds that the MOA had been breached. The 1979 action went to [208] trial, and on February 21, 2002, a jury awarded DIBCO nearly $4.1 million in compensation for its land.

United States v. *Certain Land Situated in the City of Detroit*, 361 F.3d 305, 306-07 (6th Cir. 2004).

As indicated above, the suit that has generated this appeal was tried to a jury in 2002. In addition to the trial itself, the district court issued two opinions that are at the heart of this appeal. The first, *United States* v. *Certain Land Situated in the City of Detroit*, 188 F. Supp. 2d 747 (E.D. Mich. 2002), memorialized the court's ruling on contested motions issues, including theories of valuation; the second, *United States* v. *Certain Land Situated in the City of Detroit*, 286 F. Supp. 2d 865 (E.D. Mich. 2003), concerned the amount of interest due on the judgment.

The jury returned a verdict awarding DIBCO $4,098,174.00, which the company contends is inadequate. After the verdict, the parties disagreed upon the amount of interest owed to DIBCO on the difference between the jury award and the amount that the United States had paid in the course of the litigation. The district court held that the

proper calculation of the interest owed on the deficiency is based upon the Declaration of Taking Act, 40 U.S.C. § 258a.[2] The United States then deposited $15,683,327.05 with the district court clerk to fulfill the judgment. This appeal followed.

II.

1. Did the district court err in limiting the theories that the jury could consider when calculating its compensation award?

Because "it has been long settled that there is no constitutional right to a jury in eminent domain proceedings," it is not the Seventh Amendment but Rule of Civil Procedure 71A that controls how the district court resolves claims like the one before us. *United States* v. *Reynolds*, 397 U.S. 14, 18-19 (1970). Rule 71A(h) provides for "a trial by jury of the issue of just compensation" under certain conditions; except for just compensation, however, "[t]rial of all issues shall otherwise be by the court." The Court in *Reynolds* construed the scope of the jury's power as follows:

> [W]e think the Rule's basic structure makes clear that a jury in federal condemnation proceedings is to be confined to the performance of a single narrow but important function—the determination of a compensation award within ground rules established by the trial judge . . . . [W]hen a jury is afforded, the sweeping language of the final sentence of the Rule discloses a clear intent to give the district judge a role in condemnation proceedings much broader than he occupies in a conventional jury trial. It is for him to decide "all issues" other than the precise issue of the amount of compensation to be awarded. It follows that it is for the judge to tell the jury the criteria it must follow in

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[2] The statute has been re-codified. References in this opinion are to the codification sections cited by the district court.

> determining what amounts will constitute just compensation, and that in order to do so he must decide the "scope-of-the-project" issue as a preliminary matter.

Reynolds, 397 U.S. at 20. The issue in *Reynolds* concerned whether certain lands condemned by the government were within the original "scope of the project"—the construction of a reservoir. *Id.* at 18. Although the property owners argued that the "scope of **[209]** the project" presented a jury question, the Court held otherwise. *Id.* at 20.

Analogously, DIBCO takes the position that the condemned property effectively constituted part of the Ambassador Bridge. If viewed in this light, then the condemnation represents a partial taking, justifying severance damages. As set out below, the district court elected to exclude certain valuation evidence that DIBCO introduced from consideration by the jury. The company takes issue with the following reasoning of the district court:

> DIBCO seeks to offer evidence of (1) lost profits allegedly suffered by the Bridge and/or (2) the diminution in the value of its property after the taking (i.e., the difference between the before and after taking value of the Bridge and the adjacent taken property) contending that the "highest and best use" of the condemned parcel of property adjacent to the bridge is its use as part of the Ambassador Bridge. In support of its position regarding severance damages and diminution of value, DIBCO relies principally upon *United States* v. *104 Acres, more or less in Keeler Township, Van Buren County*, 666 F. Supp. 1017, 1026 (W.D. Mich. 1987), contending that the relevant facts of this action "are identical" to those in the *Van Buren County* case.
>
> In *Van Buren County*, the Government took in fee a small part of one parcel of defendant's property and an easement over a substantial part of the remainder of that parcel. The property was used for

> farming, specifically for growing corn. The parcel had a central pivot irrigation system on it. It was undisputed that the highest and best use of the property was as a farm.
>
> . . . .
>
> *Van Buren* is readily distinguishable from the instant case because in *Van Buren*, the adjacent property was at the time of the taking being put to an integrated unitary use with the condemned parcel, and as a consequence, the property owner was entitled to "severance damages" for diminution of the value of the adjacent land in addition to the fair market value of the property actually taken. Here, there is no dispute that the condemned property was *not* at the time of the taking being used as an integrated part of the Bridge.
>
> . . . .
>
> The weight of authority . . . is that there must be evidence that such an integrated, unitary use with an adjacent parcel of land must have existed at the time of the taking. *See United States* v. *1,162.65 Acres of Land*, 498 F.2d 1298, 1300 (8th Cir. 1974) ("[T]he applicable working rule requires that if, on the facts of a particular case, it is determined that the particular tracts condemned were at the time of taking, in fact being used and devoted to a unitary use together with another tract, the tracts taken and the tracts not taken must be considered as a single unit in both the before and after valuations.") It is undisputed here that at the time of the taking there was no unity of use with respect to the condemned property and DIBCO's Ambassador Bridge property.

Certain Land, 188 F. Supp. 2d at 749-51 (citations omitted) (emphasis original). Because the district court concluded that no "unitary use" of the property existed at the time of the taking, it disallowed severance damages. *Id.* at 753-54.

We begin with the uncontested proposition that "[t]he constitutional requirement of just compensation derives as much content from the basic equitable **[210]** principles of fairness, as it does from technical concepts of property law." *United States* v. *Fuller*, 409 U.S. 488, 490 (1973) (citation omitted). Fairness means that the owner of condemned property "is entitled to be put in as good a position pecuniarily as if his property had not been taken. He must be made whole but is not entitled to more." *Olson* v. *United States*, 292 U.S. 246, 255 (1934); *See Reynolds*, 397 U.S. at 16. In making this determination, the following considerations apply:

> Just compensation includes all elements of value that inhere in the property, but it does not exceed market value fairly determined. The sum required to be paid the owner does not depend upon the uses to which he has devoted his land but is to be arrived at upon just consideration of all the uses for which it is suitable. The highest and most profitable use for which the property is adaptable and needed or likely to be needed in the reasonably near future is to be considered, not necessarily as the measure of value, but to the full extent that the prospect of demand for such use affects the market value while the property is privately held.

Olson, at 255 (citation omitted).

DIBCO contends that, under these principles, the district court erred when it instructed the jury as follows:

> I want to talk to you about this notion of highest and best use. In fixing the fair market value of the property in question, you should consider the highest and best use to which the property was reasonably adaptable at the time of the taking or in the reasonably near future thereafter.
>
> . . . .
>
> Mere possibility of such use or adaptation is not enough. . . .

> Mere geographical or physical adaptability, alone, is not enough.
>
> . . . .
>
> [Y]ou've heard evidence from The Bridge Company that the highest and best use was to be combined with the bridge property next door and used for overall bridge operations.
>
> However, as I told you earlier, I have now instructed you that you may not consider this use for the bridge.
>
> In other words, you may not consider the integrated use of the property that [DIBCO's expert] Mr. Walsh testified to. You may consider other uses which you find from the evidence that meets the tests, and the rules I've explained in these instructions, including the proximity of the condemned property to the bridge.

The district court explained the reason for its approach in these terms:

> [T]he evidence presented in this case shows that the Government's intention to take the property was made public prior to the time that DIBCO purchased the parcels of property at issue. DIBCO had specific knowledge of the intended taking at least as of December 1976. [See Plaintiff's Ex. 27, letter from DIBCO president Roy Lancaster to Dennis Keilman, Director of the GSA Space Management Division, acknowledging DIBCO's awareness of the prospectus for the taking submitted by GSA to Congress.] Moreover, any integrated use of the condemned property with the Bridge was dependent upon the City of Detroit's vacating of 21st Street and Nash Sogoian's sale of his parcel of land to DIBCO. As of the date of taking, no steps were taken by DIBCO to effectuate the vacation of 21st Street and Defendant's own witnesses testified that Sogoian flatly refused to sell his property to

> DIBCO. Furthermore, even DIBCO [211] president, Roy Lancaster, admitted in his deposition that any integrated use of the property with the Bridge property was merely a "possibility." [See Lancaster 7/16/84 Deposition, p. 56.]
>
> For these reasons, the Court finds that there was no reasonable probability of the property in question being combined and used in conjunction with Defendant's Ambassador Bridge property in the reasonably near future.

188 F. Supp. 2d at 759.

DIBCO finds fault with the conclusion that no unitary usage of the condemned property and the bridge existed at the time of the taking. The company refers us to the passage from *Olson* cited earlier: "The highest and most profitable use for which the property is adaptable and needed or likely to be needed *in the reasonably near future* is to be considered, not necessarily as the measure of value, but to the full extent that the prospect of demand for such use affects the market value while the property is privately held." *Olson*, 292 U.S. at 255 (emphasis added). DIBCO relies upon the following evidence to back up its contention that severance damages were justified: the property could be used to alleviate traffic congestion on the bridge's plaza; condemnation eliminated this option; traffic congestion diminished the income-producing potential of the bridge; and there was no similar property available for purchase.

DIBCO likens its situation to that of a Kentucky farmer whose land was condemned for a reservoir. The district court refused to allow the jury to consider the best use as resale as residential lots. We reversed for these reasons:

> The trial judge must make a preliminary determination that there is factual support for a finding by the jury that the "property is adaptable and needed or likely to be needed in the reasonably near future" for the proposed use. Having found that there is evidence sufficient to support such a finding by the jury, the Court should then leave the

> question of adaptability and potential development to the jury. He need not be convinced that the landowner has established the development potential of the property for the proposed use by a preponderance of the evidence but only that the evidence is such that a jury could reasonably so find.

United States v. *478.34 Acres of Land, Tract No. 400*, 578 F.2d 156, 159-60 (6th Cir. 1978). Although reasonable minds might reach different conclusions about the evidence, the company contends that, at the very least, it came forward with sufficient facts to allow a jury to consider valuation based upon a "unitary use" or partial takings theory, which in turn would open the door to severance damages.

We acknowledge that this is a close question, which may explain why these two parcels of land have generated such spirited litigation. However, as we emphasized at the outset, "other than the precise issue of the amount of compensation to be awarded . . . it is for the judge to tell the jury the criteria it must follow in determining what amounts will constitute just compensation." *Reynolds*, 397 U.S. at 20. The district court's opinion marshals a number of facts in support of its decision to preclude the jury from considering the valuation theories proposed by DIBCO. Because we detect no error in either its factual findings or in their application to the subsequent jury instructions, we affirm the district court on this issue.

2. Did the district court err in looking to the Declaration of Taking Act in fixing the appropriate interest rate on the deficiency?

In an opinion published after trial and briefing by the parties, the district [212] court calculated the interest owed to DIBCO by the government based upon the Declaration of Taking Act, 40 U.S.C. § 258a (re-codified as 40 U.S.C, § 3114). *Certain Land*, 286 F. Supp. 2d 865 (E.D. Mich. 2003). Because the determination of a reasonable rate of interest for just compensation is a finding of fact, our review is for clear error. *Schneider* v. *County of San Diego*, 285 F.3d

784, 790 (9th Cir. 2002) (citing *United States* v. *50.50 Acres of Land*, 931 F.2d 1349, 1354 (9th Cir. 1991)).

The district court began by noting that "interest is to be calculated based only upon the deficiency, and not upon the amounts previously paid to the court" by the government. *Id.* at 867. After reviewing the history of deposits made by the government, the court determined the deficiency:

> [T]he Court will amend the Judgment in this matter to reflect the Government's previous deposits of $828,000.00 and $412,000.00 with the Court. These sums will be deducted from the jury award and, therefore, the principal amount of the Amended Judgment will be $2,858,174.00. Pursuant to Section 258a of the Declaration of Taking Act, it will be this sum upon which interest will be calculated.

Id. at 868.

In choosing to proceed under the Declaration of Taking Act, the court looked to the mandatory language of § 258a: "[J]udgment *shall* include, as part of the just compensation awarded, interest in accordance with section 6 [258e-1] of this Act on the amount finally awarded as the value of the property as of the date of taking, from said date to the date of payment; but interest shall not be allowed on so much thereof as shall have been paid to the court." Section 258e-1 provided in relevant part as follows:

> Where the period for which interest is owed is more than one year, interest for the first year shall be calculated in accordance with paragraph (1) and interest for each additional year shall be calculated on the combined amount of the principal (the amount by which the award of compensation exceeds the deposit referred to in section 258a of this title) and accrued interest at an annual rate equal to the weekly average 1-year constant maturity Treasury yield, as published by the Board of Governors of the Federal Reserve System, for the calendar year week preceding the beginning of each additional year.

40 U.S.C. § 258e-1(2) (now 40 U.S.C. § 3116(a)).

DIBCO argued below that the Declaration of Taking Act set an inadequate rate to compensate the company for the lengthy delay in receiving payment. Instead, it proposed alternative rates, which the district court rejected for these reasons:

> The legislative history of this Act makes clear that the intent of Congress in enacting the 1986 amendments was to provide for uniformity in the district courts in their determination of the appropriate rate of interest to be applied in condemnation cases. As stated in the House Judiciary Committee's Report which accompanied the bill (H.R. 5363) which ultimately became law:
>
> The purpose of H.R. 5363 is to amend the interest provisions of the Declaration of Taking Act (40 U.S.C. 258a) to establish a uniform statutory rate of interest in eminent domain cases.
>
> See H.R. Rep. 99-914, *reprinted in* 1986 U.S. Code Cong. & Admin. News 6202 (emphasis added).
>
> The Report further noted that "this legislation will solve a long-standing problem encountered in eminent domain **[213]** cases brought in district courts under the Declaration of Taking Act regarding the appropriate rate of interest." *Id.* at 6203. As explained in the House Report, the Declaration of Taking Act, which was enacted in 1931, provided for interest at a rate of 6 percent per annum. This interest rate had not been changed since the statute was enacted. *Id.* In endorsing H.R. 5363, the Congressional Budget Office noted:
>
> Currently the interest rate applicable to the taking of real estate is set by law at 6 percent. The courts generally consider this 6 percent rate to be a minimum, and usually apply a higher interest rate (based on market rates). This bill would make their application uniform and consistent among the

> courts. It would also eliminate the treatment of the interest rate as a question of fact to be determined by the courts.
>
> *Id.* at 6204 (emphasis added).
>
> Given the mandatory language of the statute and the very clear legislative history, the Court finds that applying any rate other than the statutory rate formulated in § 258e-1 would contravene the clear intent of Congress. The Court is unaware of any precedent or doctrine which provides a sound jurisprudential rationale that would permit the Court to ignore such a clear legislative mandate. The fact that determining just compensation is a judicial function does not render calculation of interest on that compensation a judicial function where Congress has clearly indicated its intention to fully occupy the field in this area.
>
> . . . .
>
> [T]he Court finds that the statutory rate of interest set forth in § 258e-1 provides DIBCO what a reasonable and prudent investor would earn while investing though guaranteeing the safety of the principal. The interest rate provided in § 258e-1 is not a fixed rate; it is a fluctuating rate that tracks the upward and downward movement of market interest rates, generally. Thus, this method of determining interest is a market-driven rate. Second, an investment in U.S. Treasury securities is safe because an investor will not lose the principal underlying the investment, as he would risk doing in the stock or bond market.

Certain Land, 286 F. Supp. 2d at 870-71 (citation omitted).

DIBCO points out that, during the time frame at issue, the application of the statutory interest rate generated much less money for the company than several other rates that it proposed to the district court. The statutory rate generated $12,873,452 of pre-judgment interest, while a 30-year bond

rate would have produced $40,732,947 on the same amount—a difference of $27,499,495.

While it is true that DIBCO would have been better off had the money been tied to different indices over the period in question, there is nothing to suggest that the district court's adoption of the statutorily required rate constituted clear error; in light of the "reasonably prudent investor" standard, we decline to reverse the district court's decision with respect to interest rates.[3]

III.

The judgment of the district court is affirmed in all respects.

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[3] DIBCO also contends that it should have been afforded an evidentiary hearing on the issue. Given the amount of material submitted by the parties, however, we detect no abuse of discretion on the part of the court in denying an evidentiary hearing.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN,
SOUTHERN DIVISION

No. 79-CV-73934-DT

UNITED STATES OF AMERICA, PLAINTIFF,

v.

CERTAIN LAND SITUATED IN THE CITY OF DETROIT, WAYNE COUNTY, MICHIGAN, AND THE DETROIT INTERNATIONAL BRIDGE COMPANY, ET AL., DEFENDANTS.

Sept. 30, 2003

[286 F. Supp. 2d 865]

OPINION AND ORDER REGARDING DEFENDANT DETROIT INTERNATIONAL BRIDGE COMPANY'S MOTION TO CORRECT JUDGMENT ON VERDICT

ROSEN, District Judge.

I. INTRODUCTION

The above-captioned eminent domain action came before the Court for a trial by jury on the issue of just compensation due and owing to the Detroit International Bridge Company ("DIBCO") in January-February 2002. At the close of trial, the jury rendered a verdict in favor of DIBCO on two parcels of land owned by it which were condemned by the Government. The jury's verdict awarded DIBCO $398,774.00 for Parcel 1 and $3,699,400.00 for Parcel 3, for a total jury award of $4,098,174.00, and on February 20, 2002, the Clerk of the Court entered a Judgment on the Verdict

reflecting these amounts. The Judgment further provided that "The amount of interest shall be determined by the Court at a later date." [*See* Pl. # 452.] The Court subsequently directed the parties to attempt to stipulate to the amount of interest, but the parties were unable to do so. Therefore, the parties were ordered to brief their positions on this matter.

Having reviewed and considered the parties' briefs, supporting exhibits and the applicable law, the Court is now prepared to rule on this matter. This Opinion and Order sets forth the Court's ruling.

[867]

II. DISCUSSION

The issues presently before the Court are governed by the Declaration of Taking Act, 40 U.S.C. §§ 258a-258f. In pertinent part, the Act provides as follows:

> § 258a. In any proceeding in any court of the United States . . . which has been instituted by . . . the United States for the acquisition of any land . . . for the public use, the petitioner may file in the cause with the petition . . . a declaration of taking . . . declaring that said lands are taken for the use of the United States . . . .
>
> Upon the filing of said declaration of taking and of the deposit in the court, to the use of the persons entitled thereto, of the amount of the estimated compensation stated in said declaration, title to the said lands . . . shall vest in the United States, and the right to just compensation for the same shall vest in the persons entitled thereto; and said compensation shall be ascertained and awarded in said proceeding and established by judgment therein, and the said judgment shall include, as part of the just compensation awarded, interest in accordance with section 6 of this Act [40 U.S.C. § 258e-1] on the amount finally awarded as the value of the property as of the date of taking, from said date to the date of

> payment; but interest shall not be allowed on so much thereof as shall have been paid into the court. No sum so paid into the court shall be charged with commissions or poundage.
>
> Upon the application of the parties in interest, the court may order that the money deposited in the court, or any part thereof, be paid forthwith for or on account of the just compensation to be awarded in said proceeding. If the compensation finally awarded in respect of said lands or any parcel thereof, shall exceed the amount of money so received by any person entitled, the court shall enter judgment against the United States for the amount of the deficiency . . . .

40 U.S.C. § 258a.

Thus, the statute makes clear that amounts deposited with the Court as estimated compensation for property taken by the Government and ordered paid the property owner for or on account of the just compensation to be awarded, are to be deducted from the amount finally awarded in the condemnation proceeding, and interest is to be calculated based only upon the deficiency, and not upon any amounts previously paid into the Court.

A. Adjustment Of The Principal Amount Of The Judgment

As indicated, the Judgment on the Verdict as entered by the Clerk of the Court reflects the total amount awarded by the jury, i.e., $4,098,174.00. However, the Judgment on the Verdict failed to reflect sums previously deposited by the Government with the Court as estimated compensation for the taking of the property. On October 11, 1979, the Government deposited with the Court $48,000.00 as estimated compensation due to DIBCO for Parcel 1, and $780,000.00 as estimated compensation for Parcel 3. This total sum of $828,000.00 was paid to DIBCO on February 27, 1980. The parties are in agreement that this sum should be deducted from the principal amount of the Judgment.

The Government further points out that an additional sum of $412,000.00 was deposited with the Court, in an interest-bearing account, on June 9, 1987, and contends that this sum should also be deducted from the principal amount of the Judgment. DIBCO argues that the Court should not deduct this $412,000.00 deposit from the Judgment because it was made "for purposes of possible settlement," and since no settlement was reached and the [868] matter had to be tried to a jury, Defendant maintains that this sum should simply be regarded as the Government's money. [*See* DIBCO's Reply Brief, p. 5.]. Defendant has cited no law to support its contention nor has the Court independently found any such legal support.

It is clear to the Court that the $412,000.00 was deposited as additional estimated compensation for the taking of the DIBCO property. The fact that a settlement was not consummated in 1987 did not make the deposit unavailable and DIBCO has put forth no evidence to suggest that the United States prevented it from applying for withdrawal of the $412,000.00, plus interest, at any time. As indicated above, the Declaration of Taking Act specifically provides that, upon the application of the parties in interest, the court may order that monies deposited in the court "be paid forthwith for or on account of the just compensation to be awarded in said proceeding." 40 U.S.C. § 258a.[1] In accordance with this provision, the Court will enter an Order di-

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[1] Even assuming *arguendo*, as DIBCO posits, that the Memorandum of Agreement ("MOA") once executed, controlled disbursement of the $412,000.00, DIBCO concedes that the "MOA unraveled" and suggests that the parties' failure to agree upon an "Approved Plan" by January 1, 1992, rendered the terms and conditions of the MOA null and void. (*See* DIBCO's Reply Brief, p. 4). Under these circumstances, the MOA could not serve as a bar to the disbursal of the $412,000.00 after January 1, 1992, and the "unraveling" of the MOA did not convert the $412,000.00 deposited with the Court from estimated compensation to "the Government's money." Indeed, the Declarations of Taking Act, at least, implicitly precludes such a result. *See* 40 U.S.C. § 258a. ("No sum so paid into the court shall be charged with commissions or poundage.")

recting payment of the $412,000.00 to DIBCO, and this sum will also be deducted from the principal amount of the Judgment.[2]

Accordingly, the Court will amend the Judgment in this matter to reflect the Government's previous deposits of $828,000.00 and $412,000.00 with the Court. These sums will be deducted from the jury award and, therefore, the principal amount of the Amended Judgment will be $2,858,174.00. Pursuant to Section 258a of the Declaration of Taking Act, it will be this sum upon which interest will be calculated.

B. Interest Calculation

As indicated above, 40 U.S.C. § 258a provides that the judgment entered in a condemnation proceeding "shall include, as part of the just compensation awarded, interest in accordance with section 6 of this Act [§ 258e-1] on the amount finally awarded as the value of the property as of the date of taking, from said date to the date of payment...."

Section 258e-1 provides as follows:

> Interest required to be paid under section 258a to 258e-1 of this title shall be calculated by the district court as follows:
>
> (1) Where the period for which interest is owed does not exceed one year, interest shall be calculated for such period from the date of taking at an annual rate equal to the weekly average 1-year constant maturity Treasury yield, as published by the Board of Governors of the Federal Reserve System, for the calendar week preceding the date of taking.
>
> (2) Where the period for which interest is owed is more than one year, interest for the first year shall

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[2] Interest has accrued on the $412,000.00 while in the Court's interest-bearing account, and it, too, will also be disbursed to DIBCO, although the accrued interest will not deducted from the principal amount of judgment.

> be calculated in accordance with paragraph (1) and [869] interest for each additional year shall be calculated on the combined amount of the principal (the amount by which the award of compensation exceeds the deposit referred to in section 258a of this title) and accrued interest at an annual rate equal to the weekly average 1-year constant maturity Treasury yield, as published by the Board of Governors of the Federal Reserve System, for the calendar week preceding the beginning of each year . . . .

40 U.S.C. § 258e-1 (emphasis added).

Defendant DIBCO argues that the statutory formula set forth in § 258e-1 is inadequate to compensate it for the lengthy delay in receiving of compensation for its property and, therefore, the Court should not calculate interest on the judgment using the that formulation. Instead, DIBCO contends that the Court should award pre-judgment interest using either (1) an average rate of Moody's Composite Index Rate of (BAA rated) Corporate Bond Yields; or (2) a "blended rate" using the Moody's index for AAA-rated bonds and DIBCO's actual borrowing costs.

In support of its position that the Court should treat the formulation provided in § 258e-1 as "a floor and not a ceiling" on the rate of interest to be applied to the judgment in this case, DIBCO relies principally upon *United States* v. *50.50 Acres*, 931 F.2d 1349 (9th Cir. 1991), and a number of cases which pre-date the 1986 amendments of the Declaration of Taking Act.

Following a bench trial to determine just compensation in *50.50 Acres*, the district court awarded $4,325,781 for the value of the land taken and awarded interest of 9% per year on the award from the date of taking. The government appealed the 9% per year interest award arguing that the lower court should have followed the statutory formula provided in § 258e-1. The Ninth Circuit rejected the government's contention that the district court was bound by the statutory interest rate and, relying on two earlier Ninth Circuit decisions, *United States* v. *429.59 Acres of Land*, 612

F.2d 459 (9th Cir. 1980), and *United States* v. *Blankinship*, 543 F.2d 1272 (9th Cir. 1976), stated that when determining the appropriate rate to be used in condemnation actions, lower courts should first consider whether the statutory rate is unreasonable, and if so, should use an interest rate based on evidence of a diverse group of securities. 931 F.2d at 1355-56.

In reaching this conclusion, the *50.50* court acknowledged that since the decisions in *429.59 Acres* and *Blankinship*, the Declaration of Taking Act had been amended to provide the statutory scheme now embodied in § 258e-1. Prior to the 1986 amendments, the Act merely provided that the judgment entered in a condemnation action "shall include, as part of the just compensation awarded, interest at the rate of 6 per centum per annum." *See* Historical and Statutory Notes following 40 U.S.C.A. § 258a, Act of Feb. 26, 1931, c 307, 46 Stat. 1421; and 1986 Amendments, Pub. L. 99-656.

In *50.50 Acres*, the Government argued that while the old statutory rate could only be a floor for interest awards, Congress intended that the new statute act as a ceiling. Although the Ninth Circuit acknowledged that the new statute was enacted in 1986 "in response to the courts' rejection of the 6% flat rate" and "attempts to create a variable interest rate reflective of market changes," 931 F.2d at 1355, without much discussion, the court rejected the Government's argument stating that "nothing in the statute can change the Supreme Court's determination that just compensation 'is a judicial[,] not a legislative[,] function.'" *Id.* (quoting **[870]** *Monongahela Navigation Co.* v. *United States*, 148 U.S. 312 (1893)).[3]

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[3] The Ninth Circuit's reliance on *Monongahela* in this regard is puzzling. In *Monongahela*, Congress authorized the condemnation of the property owner's lock and dam but added a proviso that in determining the award, the property owner's franchise to collect tolls was not to be considered. It was in the context of rejecting this proviso that the Supreme Court said the right to compensation was a judicial, not a legisla-

In *50.50 Acres*, the district court failed to first determine that the statutory rate was unreasonable. Therefore, the appellate court remanded the case to the district court "for a determination of whether the new statutory formula provides a 'proper and reasonable' interest rate, and if not, application of an interest rate based on evidence of a diverse group of securities, including Treasury bills." *Id.* at 1356.

It is based upon *50.50 Acres* and the cases cited therein that DIBCO argues in this case that the Court should not apply the interest calculation formula set forth in § 258e-1 and instead use its proposed Moody's BAA bond rate or a blended rate. The Court declines to follow DIBCO's proposal for several reasons.

First, *50.50 Acres* is a Ninth Circuit decision and, of course, is not controlling precedent in this Circuit. Second, all of the other cases relied upon by Defendant pre-date the 1986 amendments of the Declaration of Taking Act which added § 258e-1 to the statute and set out the variable interest rate formulation now provided in that section. Third, and most importantly, the amended Act unambiguously speaks in mandatory language: "Interest required to be paid under section[] 258a . . . of this title *shall* be calculated by the district court as follows . . . ." 40 U.S.C. § 258e-1.

The legislative history of this Act makes clear that the intent of Congress in enacting the 1986 amendments was to provide for uniformity in the district courts in their determination of the appropriate rate of interest to be applied in condemnation cases. As stated in the House Judiciary Committee's Report which accompanied the bill (H.R. 5363) which ultimately became law:

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tive question. The question of interest, however, relates not to the amount of the award itself but to preserving the value of the award. While an award reflects the many unique characteristics of the particular parcel taken, an interest rate is less unique or particularized. *See State* v. *Jim Lupient Oldsmobile Co.*, 509 N.W.2d 361 (Minn. 1993) (Simonett, J., concurring specially to comment on what is a "judicial question").

> The purpose of H.R. 5363 is to amend the interest provisions of the Declaration of Taking Act (40 U.S.C. 258a) *to establish a uniform statutory rate of interest in eminent domain cases.*

See H.R. Rep. 99-914, *reprinted in* 1986 U.S. Code Cong. & Admin. News 6202 (emphasis added).

The Report further noted that "this legislation will solve a long-standing problem encountered in eminent domain cases brought in district courts under the Declaration of Taking Act regarding the appropriate rate of interest." *Id.* 6203. As explained in the House Report, the Declaration of Taking Act, which was enacted in 1931, provided for interest at a rate of 6 percent per annum. This interest rate had not been changed since the statute was enacted. *Id.* In endorsing H.R. 5363, the Congressional Budget Office noted:

> Currently the interest rate applicable to the taking of real estate is set by law at 6 percent. The courts generally consider this 6 percent rate to be a minimum, and usually apply a higher interest rate (based on market rates). *This bill would make their application uniform and consistent among the courts.* It **[871]**would also eliminate the treatment of the interest rate as a question of fact to be determined by the courts.

Id. at 6204 (emphasis added).

Given the mandatory language of the statute and the very clear legislative history, the Court finds that applying any rate other than the statutory rate formulated in § 258e-1 would contravene the clear intent of Congress. The Court is unaware of any precedent or doctrine which provides a sound jurisprudential rationale that would permit the Court to ignore such a clear legislative mandate. The fact that determining just compensation is a judicial function does not render calculation of interest on that compensation a judicial function where Congress has clearly indicated its intention to fully occupy the field in this area.

But, even if the Court were to follow the Ninth Circuit's *50.50 Acres* ruling, the outcome would be the same. As the *50.50 Acres* court instructed, the initial determination for the district courts to make under its ruling is to determine "whether the new statutory formula provides a 'proper and reasonable' interest rate." It is only if the court determines that the statutory rate is unreasonable that any consideration may given to other methods to establish a rate of interest.

Defendant's protestations to the contrary notwithstanding, the Court finds that the statutory rate of interest set forth in § 258e-1 provides DIBCO what a reasonable and prudent investor would earn while investing though guaranteeing the safety of the principal. *See 50.50 Acres*, *supra* (quoting *United States* v. *429.59 Acres of Land*, 612 F.2d at 465). The interest rate provided in § 258e-1 is not a fixed rate; it is a fluctuating rate that tracks the upward and downward movement of market interest rates, generally. Thus, this method of determining interest is a market-driven rate. Second, an investment in U.S. Treasury securities is safe because an investor will not lose the principal underlying the investment, as he would risk doing in the stock or bond market. Therefore, the statutory interest rate provided in § 258e-1 satisfies the Ninth Circuit's test: investing in U.S. Treasury bills "produces a reasonable return while maintaining safety of the principal." *429.59 Acres*, *supra*, 612 F.2d at 465.

CONCLUSION

For all of the foregoing reasons, the Court determines that interest on the Judgment in this case shall be determined by application of the statutory rate of interest provided in 40 U.S.C. § 258e-1(2). Interest shall be calculated on the principal amount of $2,858,174.00 and, as provided in

§ 258a, interest will accrue from the date of taking, i.e., October 11, 1979, until the date of payment.[4]

SO ORDERED.[5]

[872]

AMENDED JUDGMENT

The Court having this date, entered an Opinion and Order regarding Defendant Detroit International Bridge Company's Motion to Correct the Judgment on the Verdict entered on February 20, 2002, and being otherwise fully advised in the premises,

NOW, THEREFORE,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that an Amended Judgment is entered in favor of the Detroit International Bridge Company in the total amount of $2,858,174.00, plus interest at the statutory rate of interest provided in 40 U.S.C. § 258e-1(2), from October 11, 1979 to the date of payment.

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[4] As the statute calls for interest to accrue from the date of taking *to the date of payment*, to the extent that DIBCO requested inclusion of "pre-*judgment*" interest, that request is rejected. The effect of the statute is to conjoin what otherwise would be pre- and post-judgment interest (which, pursuant to 28 U.S.C. § 1961, would be computed using the same "weekly average 1-year constant maturity Treasury yield" as the Declaration of Taking Act.)

[5] Now that the Court has established the appropriate method for calculating interest, the parties shall follow the statutory formula and this Order and, upon setting a date of payment, submit to the Court a stipulated order reflecting the amount of interest to be paid to DIBCO. Failure of the parties to agree on such an amount will result in the imposition of sanctions against the party whose position does not prevail if the Court is required to adjudicate the dispute unless the non-prevailing party's position is supported by good faith legal and/or factual argument.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN,
SOUTHERN DIVISION

No. 79-CV-73934-DT

UNITED STATES OF AMERICA, PLAINTIFF,

v.

CERTAIN LAND SITUATED IN THE CITY OF DETROIT, WAYNE COUNTY, MICHIGAN, ET AL., DEFENDANTS.

Feb. 20, 2002

[188 F. Supp. 2d 747]

[749]

MEMORANDUM OPINION AND ORDER REGARDING PLAINTIFF'S MOTION IN LIMINE AND DEFENDANT DETROIT INTERNATIONAL BRIDGE COMPANY'S VALUATION THEORIES

ROSEN, District Judge.

I. INTRODUCTION

This condemnation action is presently before the Court for trial on the issue of just compensation due to Defendant Detroit International Bridge Company ("DIBCO") for two parcels of property taken by the Government in 1979 for the expansion of the U.S. Customs secondary cargo inspection facility on the American side of the Ambassador Bridge. The property taken is comprised of two parcels (A1 and A3) between 20th and 21st Streets, south of Porter Street and north of Howard Street. As of the date of taking, October

11, 1979, Parcel A1 was improved with a 43-door truck terminal. Parcel A3 was vacant land. Both parcels are in close proximity to the Ambassador Bridge. Both the Ambassador Bridge and the property taken are owned by Defendant DIBCO.

Prior to trial, the parties filed a number of *in limine* motions. The Court made its rulings on the record on February 8, 2002 on all of these motions with the exception of Plaintiff's Motion *in Limine* to Exclude the Report and Proposed Testimony of Defendant's Expert, Jonathan Vanderveen. With regard to the Vanderveen motion, the Court took the valuation issues raised therein under advisement. This engendered a series of supplemental briefs and arguments from the parties during the course of the proceedings the week of February 11, 2002. Although the Court has verbally ruled from the bench on the issues raised by the parties, it is now issuing this Memorandum Opinion and Order so that there may be a clear record of the Court's rulings as to what matters will and will not be submitted to the jury.

II. DISCUSSION

A. Evidence Of The Bridge's Lost Profits/Diminution In Value As Evidence Of Fair Market Value Of The Condemned Property

1. DIBCO May Not Recover Lost Profits Suffered By The Ambassador Bridge As Severance Damages

DIBCO seeks to offer evidence of (1) lost profits allegedly suffered by the Bridge and/or (2) the diminution in the value of its property after the taking (i.e., the difference between the before and after taking value of the Bridge and the adjacent taken property) contending that the "highest and best use" of the condemned parcel of property adjacent to the bridge is its use as part of the Ambassador Bridge. In support of its position regarding severance damages and diminution of value, DIBCO relies principally upon *United States* v. *104 Acres, more or less in Keeler Township, Van Buren County*, 666 F. Supp. 1017, 1026 (W.D. Mich. 1987),

contending that the relevant facts of this action "are identical" to those in the *Van Buren County* case.

In *Van Buren County*, the Government took in fee a small part of one parcel of defendant's property and an easement over a substantial part of the remainder of that parcel. The property was used for farming, specifically for growing corn. The parcel had a central pivot irrigation system on it. It was undisputed that the highest and best use of the property was as a farm.

The *Van Buren* court awarded just compensation in three parts. First, it awarded the fair market value of the portion of the [750] parcel taken in fee based upon its highest and best use as a farm. It also awarded "partial taking" damages for the easement over the remainder of the parcel based upon the "before and after taking" value of the parcel. Third, the court found that the property owner would have also irrigated a 65-acre parcel of land he owned adjacent to the condemned property with the center pivot system that was on the principal parcel but for the Government's taking of the easement on the principal parcel which precluded such irrigation. For damage to this 65-acre adjacent parcel the Court awarded "incidental" severance damages based upon the difference in the values of irrigated and non-irrigated cornland.

It is based upon the *Van Buren* court's award of damages that DIBCO here contends that it can use its loss of revenues on the adjacent Ambassador Bridge allegedly due to the Government's taking of the adjacent property to establish the fair market value of the taken property.

As shown below, *Van Buren* is readily distinguishable from the instant case because in *Van Buren*, the adjacent property was *at the time of the taking* being put to an integrated unitary use with the condemned parcel, and as a consequence, the property owner was entitled to "severance damages" for diminution of the value of the adjacent land in addition to the fair market value of the property actually taken. Here, there is no dispute that the condemned prop-

erty was *not* at the time of the taking being used as an integrated part of the Bridge.

The applicable rule of law in such cases was succinctly compiled by the court in *Baetjer* v. *United States*, 143 F.2d 391 (1st Cir. 1944):

> The first question before us here, therefore, and the basic one in all severance damage cases, is what constitutes a "single" tract as distinguished from "separate" ones. The answer does not depend upon artificial things like boundaries between tracts as established in the owner's chain of title, nor does it depend necessarily upon whether the owner acquired his land in one transaction or even at one time. Neither does it wholly depend upon whether holdings are physically contiguous. Contiguous tracts may be "separate" ones if used separately and tracts physically separated from one another may constitute a "single" tract if put to an integrated unitary use or even if the possibility of their being so combined in use "in the reasonably near future . . . is reasonably sufficient to affect market value . . . ."
>
> Integrated use, not physical contiguity, therefore, is the test. Physical contiguity is important, however, in that it frequently has great bearing on the question of unity of use. Tracts physically separated from one another frequently, but we cannot say always, are not and cannot be operated as a unit, and the greater the distance between them the less is the possibility of unitary operation, but separation still remains an evidentiary, not an operative fact, that is, a subsidiary fact bearing upon but not necessarily determinative of the ultimate fact upon the answer to which the question hinges.

Id. at 394 (citations omitted). *See also United States* v. *287.89 Acres of Land in Clearfield County*, 241 F. Supp. 464 (W.D. Pa. 1965) ("In determining just compensation in this case for the taking of one of three tracts of land which were

in the same ownership and in fact have been used and treated as a unit, we think it is the law that they should be treated as a unit in estimating damages.").

In *International Paper Co.* v. *United States*, 227 F.2d 201 (5th Cir. 1955), the Fifth Circuit explained the applicable principles of law as follows:

> [751] It is not denied that in rendering the "just compensation" secured by the constitution of the United States to the citizen whose property is taken for public uses it is right and proper to include the damages in the shape of deterioration in value which will result to the residue of the tract from the occupation of the part so taken. In applying this rule, however, regard is had to the integrity of the tract as a unitary holding by the owner. The holding from which a part is taken for public uses must be of such a character as that its integrity as an individual tract shall have been destroyed by the taking. Depreciation in the value of the residue of such a tract may properly be considered as allowable damages in adjusting the compensation to be given to the owner for the land taken. It is often difficult, when part of a tract is taken, to determine what is a distinct and independent tract; but the character of the holding, and the distinction between a residue of a tract whose integrity is destroyed by the taking and what are merely other parcels or holdings of the same owner, must be kept in mind in the practical application of the requirement to render just compensation from property taken for public uses. How it is applied must largely depend upon the facts of the particular case and the sound discretion of the court.

227 F.2d at 205-206 (quoting *Sharp* v. *United States*, 191 U.S. 341 (1903).)

The weight of authority, however, is that there must be evidence that such an integrated, unitary use with an adjacent parcel of land *must have existed at the time of the tak-*

ing. See United States v. *1,162.65 Acres of Land*, 498 F.2d 1298, 1300 (8th Cir. 1974) ("[T]he applicable working rule requires that if, on the facts of a particular case, it is determined that the particular tracts condemned were at the time of taking, in fact being used and devoted to a unitary use together with another tract, the tracts taken and the tracts not taken must be considered as a single unit in both the before and after valuations."); *Cole Investment Co.* v. *United States*, 258 F.2d 203 (9th Cir. 1958); *United States* v. *Mattox*, 375 F.2d 461 (4th Cir. 1967); *United States* v. *765.56 Acres of Land*, 174 F. Supp. 1, 14 (E.D.N.Y. 1959), *aff'd*, 276 F.2d 264 (2nd Cir. 1960) ("[T]he concept of severance damages relates solely to the depreciation to the remainder property where a part *of a single parcel* is taken in fee."). *Accord, United States* v. *104 Acres, more of less in Keeler Township, Van Buren County, supra.* It is undisputed here that at the time of the taking there was no unity of use with respect to the condemned property and DIBCO's Ambassador Bridge property.

The Court is aware that Defendant DIBCO's claim for severance damages was previously addressed by the Court's predecessor early on in the pendency of this action. *See United States* v. *Certain Land*, 547 F. Supp. 680 (E.D. Mich. 1982). Rather than filing a motion for summary judgment on the severance damages issue, the Government had incorporated its arguments against severance damages in a motion *in limine* raising six objections to DIBCO's appraisal of the taken property. Judge Gilmore denied the Government's motion essentially finding it too early in the proceedings to enter an order *in limine* excluding broad categories of evidence. *Id.* at 681.

With respect to the severance damages aspect of the Government's March 1982 motion, Judge Gilmore stated as follows:

> The government next seeks to exclude DIBC's claim for severance damages. DIBC claims severance damages for parcels which it owns, but which have not been condemned, arguing that these [752]

parcels have lost value because of the compensation, and that it should be compensated for this loss of value. The parcels involved are parcels B1, B2, and B3 .... Parcels B1 and B2 are presently owned in fee simple by DIBC, and parcel B3 represents a reversionary interest in 21st Street, presently owned by the City of Detroit. The appraisal seems to give special value to this reversionary interest because DIBC has an interest in both sides of 21st Street and claims it could have convinced the City of Detroit to close the street, thus completely integrating parcel A1 with the current bridge plaza, and presumably making the land even more valuable.

The government contends that severance damages cannot be granted unless the severed property was in actual unitary use with the condemned property at the time of the taking, citing *Cole Investment Co.* v. *United States*, 258 F.2d 203 (9th Cir. 1958). It claims that the parcels in question here were not in such unitary use and, therefore, severance damages cannot be granted. On the other hand, DIBC argues that the unitary concept has not been universally accepted, citing *Baetjer* v. *United States*, 143 F.2d 391 (1st Cir. 1944). The test the Court will adopt here is that of *United States* v. *105.40 Acres of Land, More or Less, in Porter County, State of Indiana*, 471 F.2d 207 (7th Cir. 1972) which applied a "reasonableness" test. The Court there said the proper question to be asked was whether in the reasonably near future there was a reasonable probability that the lands in question would be put to their highest and best use in combination with the main tract so as to affect their market value. *Id.* at 211.

This matter, again, must be resolved in trial. The Court will allow evidence of severance damages subject to a preliminary factual determination that DIBC has introduced evidence sufficient to support

> a finding under Federal Rules of Evidence 104(b) that there was a reasonable probability that the severed parcels would be put to a unitary use with parcel A1 in the near future. If the preliminary factual determination finds a sufficient basis, then evidence of severance damages will go in. If the preliminary factual predicate is not laid, then they will be excluded. This can only be decided at trial, and this portion of the motion in limine must be denied.

547 F. Supp. at 685-86.

The problem with Judge Gilmore's analysis is that it conflates the notion of severance damages with the notion of "highest and best use." As indicated in his Opinion, Judge Gilmore relied upon the *Porter County, Indiana* case. *Porter County*, however, did not involve a claim for severance damages. In fact, Bethlehem Steel Company, the defendant-property owner in the *Porter County* case, had specifically disclaimed severance damages. 471 F.2d at 209.

The issue presented in *Porter County* was simply one of "highest and best use" and whether the defendant could present evidence that the highest and best use of two condemned parcels of undeveloped Lake Michigan shoreline property was their use as accessory areas (for parking, storage, maintenance, office buildings, medical facilities, and/or police and fire stations) necessary to Bethlehem Steel's new steel mill development which was already under construction on the company's property on the other side of the state highway. The issue was not whether the steel company could recover damages to its steel production business because of the Government's taking of the two shoreline parcels of land. It was in holding that Bethlehem was entitled to show that the highest and best use of the two parcels of [753] property was as accessory areas to a fully developed and integrated steel plant that the *Porter County* court stated that the then current non-unitary use of the two tracts by itself was not fatal to Bethlehem's unitary theory: "The relevant question was not the uses to which Bethlehem had devoted its land . . . but whether in the 'reasonably near

future' there was a 'reasonable probability' of the lands in question being put to their 'highest and best use' in combination with the main tract so as to affect their market value." 471 F.2d at 211. It is this "reasonableness" test of "highest and best use" in combination with other property owned by the defendant that Judge Gilmore quoted and relied upon in his 1982 Opinion in the instant action.

While DIBCO may argue that Judge Gilmore's ruling is the "law of the case" on the availability of severance damages, it is well-settled that under the law of the case doctrine, it is not improper for a court to depart from a prior holding if it is convinced that it is clearly erroneous and would work a manifest injustice. *Arizona* v. *California*, 460 U.S. 605, 619 (1983); *E.E.O.C.* v. *United Ass'n of Journeymen and Apprentices of the Plumbing and Pipefitters Industry of the U.S.*, 235 F.3d 244, 249 (6th Cir. 2000); *Free* v. *Abbott Laboratories, Inc.*, 164 F.3d 270, 272 (5th Cir. 1999); *Wheeler* v. *City of Pleasant Grove*, 746 F.2d 1437 (11th Cir. 1984). In *Hanover Ins. Co.* v. *American Eng'g Co.*, 105 F.3d 306 (6th Cir. 1997), the Sixth Circuit emphasized, "[T]his 'law of the case' doctrine is 'directed to a court's common sense' and is not an 'inexorable command'. . . . It is within the sole discretion of a court to determine if a prior ruling should be reconsidered. Thus, we decline to impose any conditions or limitations upon a court's power to review a prior ruling of [its own or of] another court." *Id.* at 312 (citations omitted).

As this Court observed on the record on February 11, 2002, this Court's obligation is to have this case go to the jury on the proper law. To the extent that Judge Gilmore's 1982 decision may be read as a statement of law that severance damages may be available if DIBCO could show that it would be reasonably probable that in the reasonably near future DIBCO would have put the taken property and its Ambassador Bridge property to a unitary use, this Court finds such a statement of law to be clearly erroneous. As indicated above, the great weight of authority is that in order to recover severance damages such a unitary use with an

adjacent parcel of land *must have existed at the time of the taking. See United States* v. *1, 162.65 Acres of Land*, 498 F.2d 1298, 1300 (8th Cir. 1974); *Cole Investment Co.* v. *United States*, 258 F.2d 203 (9th Cir. 1958); *United States* v. *Mattox*, 375 F.2d 461 (4th Cir. 1967); *United States* v. *765.56 Acres of Land*, 174 F. Supp. 1, 14 (E.D.N.Y. 1959), *aff'd*, 276 F.2d 264 (2nd Cir. 1960). *Accord, United States* v. *104 Acres of Land Situated in Van Buren County, supra. Cf. United States* v. *Wateree Power Co.*, 220 F.2d 226 (4th Cir. 1955) (where evidence established the taking of 1,530-acre tract of land destroyed access to river of 2,770-acre adjacent tract which commissioners found was capable for use as site for heavy-water-using industries, defendant was entitled to severance damages based on the difference in the value of 2,770-acre tract as a water-using industry site and its value for farm and timber purposes despite the fact that there was no current water-using industry on defendant's property; damages, however, were not permitted based upon the depreciation of defendant's entire 13,582-acre tract as a whole.)

No unitary use having existed at the time of the taking the Court finds that DIBCO is not entitled to severance damages **[754]** based upon damages (i.e., lost profits) incurred by the Ambassador Bridge.[1]

2. This Is Not A "Partial Taking" Case

DIBCO also contends that it is entitled to damages based upon the diminution in value of all of its property (i.e., the difference in cumulative value of all of its property—parcels A1, A3 and the Ambassador Bridge property—before and after the taking of parcels A1 and A3) arguing that this is a partial taking of the Ambassador Bridge, not a complete

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[1] As the Court indicated on the record on February 11, 2002, it is clear that there has been some prejudice to DIBCO and the Government by the incorrect statement of law in Judge Gilmore's opinion in that they may have prepared their experts based on an incorrect reading of *Porter County* and their reports may reflect this. In order to mitigate the prejudice, the Court will permit the parties to proceed with their proofs on highest and best use under *Porter County*.

taking of separate parcels which just happen to be adjacent to or in physical proximity to the Bridge.

As a general proposition, the "test" for determining whether a partial taking has occurred is substantially the same as the test discussed above with respect to severance damages. Indeed, *Nichols on Eminent Domain* addresses severance damages compensation (i.e., the value of the property actually taken, plus severance damages to the remainder) as being one of the two alternative theories of compensation for partial takings. *See* 4A *Nichols on Eminent Domain* § 14.02[1][a], p. 14-30 (3d ed.). The other theory of partial taking damages is the "before and after rule." *Id.* §§ 14.02[1][a],[b], pp. 14-30 to 14-31. *See also United States* v. *Banisadr Building Joint Venture*, 65 F.3d 374. 378 (4th Cir. 1995) ("[I]t is well settled that in the event of a 'partial taking'—i.e., a case in which the Government has taken one part of a larger tract, leaving the remainder to the landowner—the measure of just compensation is the difference between the fair and reasonable market value of the land immediately before the taking and the fair and reasonable market value of the portion that remains after the taking"); *United States* v. *9.20 Acres of Land*, 638 F.2d 1123, 1126-27 (8th Cir. 1981). This is the theory of damages that Defendant DIBCO seeks to apply here.[2]

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[2] DIBCO contends that the Government should be estopped from disputing that this is a partial taking. In support of this contention, DIBCO points to the report of the Government's appraiser, Donald Treadwell, in which Mr. Treadwell "assumed," for purposes of his 1985 appraisal that the terminal property was part of the entire Bridge Company property and stated that "[t]he purpose of the appraisal is to estimate the damages due to the taking of the 'terminal property' from the entire property owned by the Detroit International Bridge Company." [*See* DIBCO's "Supplemental Brief Regarding Unity of Use"] DIBCO also points to excerpts from the Government's Trial Brief in which the Government set out the law regarding partial takings and partial taking damages. *Id.* Neither Mr. Treadwell's opinion statements nor the statements of law in the Government's Trial Brief are factual assertions and the fact that Mr. Treadwell assumed for purposes of his second appraisal that there was a partial taking is irrelevant; Treadwell's first appraisal was

As with determining whether severance damages are recoverable, in determining whether Defendant is entitled to recover damages based upon the difference [755] between the value of its property before and after the taking, the first inquiry that must be made is to determine whether the property taken consists of one entire cohesive whole or of several independent parcels. Traditionally, there are three elements to establishing a unity between separate parcels: (1) unity of ownership; (2) contiguity; and (3) unity of use. *Nichols, supra*, § 14B.03[1]. Unity of use is the most important element. *Id.*, p. 14B-14.

The owner's actual use of his property in terms of physical and legal use at the time of taking creates a presumption as to the existence or absence of a unity of multiple parcels. *Id.*, § 14B.03[6]. This presumption, however, is rebuttable. *Id.* Facts which have supported unity include such things as fencing the entire property, or accounting for all of the operations under a single set of books. *Id.*, § 14B.03[4][a], and cases cited therein.

As discussed in the *Porter County* case, the question to be asked is whether in the reasonably near future there was a reasonable probability that the lands in question would be dedicated to their highest and best use in combination with the main tract so as to affect their market value. *United States* v. *105.40 Acres of Land in Porter County, Indiana, supra*, 471 F.2d at 211.

Whether there is such a unity of use is a question for the Court to decide. Fed. R. Civ. Pro. 71A(b) provides that, except for the single issue of just compensation, the trial judge is to decide all issues, legal and factual that may be pre-

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based upon a complete taking theory. It is not uncommon for parties in eminent domain actions to proceed under alternate theories of market value. *See, e.g., United States* v. *10.0 Acres of Land*, 533 F.2d 1092 (9th Cir. 1976), in which the parties were permitted to offer four different theories of market value, including by opinion evidence of the market value of the property taken based upon a complete taking theory and based upon a "before and after" valuation for a partial taking.

sented. *See also, United States* v. *Reynolds*, 397 U.S. 14 (1970). With respect to the unity issue, in *Porter County*, the Seventh Circuit specifically held that this issue was for the court to decide:

> We hold that under *Reynolds, supra*, the district judge should—upon proper consideration of evidence—decide the factual question whether the condemned parcels here were an integral part of the 1939 acres, or were functionally separate parcels. The judge should then instruct the jury on the issue of just compensation, consistent with his preliminary factual determination.

471 F.2d at 212. *See also, United States* v. *158.24 Acres of Land in Bee County, Texas*, 373 F. Supp. 659, 660 (S.D. Tex. 1974) (court to decide factual dispute as to whether the fee taking of 26.556 acres is actually a partial taking of a larger 3,500-acre tract or a complete taking of a separate 26.556-acre tract which is adjacent to said larger tract). *Cf., United States* v. *8.41 Acres of Land Situated in Orange County, Texas*, 680 F.2d 388, 393 (5th Cir. 1982) ("When applicable, the issue of unity or separateness of tracts is a question of fact to be presented to the trier of fact"); *West Virginia Pulp & Paper Co.* v. *United States*, 200 F.2d 100 (4th Cir. 1952) (relied upon by DIBCO in its "Supplemental Authority on the Question of Partial Taking and the Damages Awardable") ("*If evidence were such as to leave it a matter of some doubt* whether the land owned by the plaintiff in error were one tract or separated into three separate and distinct tracts, it would be proper to leave the question to the jury . . . ." (emphasis added)).

However, as indicated in the *Orange County* and *West Virginia Pulp & Paper* cases, and as explained by *Nichols*, the presence or absence of unity of use becomes a question of law for court to decide where reasonable minds cannot differ. *Nichols on Eminent Domain, supra*, § 14B.04[1]. This is in accord with the inherent power of the court, as a matter of law, to determine what particular evidence is so

remote or speculative as to be lacking in probative value and to be excluded from consideration by the trier of fact. *Id.*

[756] Thus, in *International Paper Co.* v. *United States*, 227 F.2d 201, 205-206 (5th Cir. 1955). the appellate court found no error on the part of the district court in refusing to submit to the jury the question of whether woodland property taken by the government and a paper mill and other parcels of land owned by International Paper constituted a "unitary tract" such that it might be entitled to compensation in the form of depreciation of market value of the entire unit where the evidence presented showed that 85% to 90% of the wood used in the processing of paper was acquired from individual owners of other timber tracts and only 10% to 15% came from International Paper's own acreage. "[T]he facts as to the indiscriminate use by the paper mill of its own and other's wood products indicates that a finding of unitary use could not be properly based upon either the current operation or any reasonable expectation in the foreseeable future that appellant would consider its own small tracts in any different light than the tracts of small owners whose products would be available on a competitive basis." *Id.* at 206.

A landowner's proposed unitary use has further been held unreasonable and the question of unity of use properly withheld from the jury where the landowner purchases the property in question with knowledge of the Government's intended taking. *See United States* v. *Mattox*, 375 F.2d 461, 463-64 (4th Cir. 1967). In *Mattox*, the Fourth Circuit found the landowner's proposed use of the condemned property as a lumber mill site "improbable" because he purchased the property with knowledge of the Government's Sutton Dam and Reservoir project. In addressing the unity of use question for purposes of severance damages, the *Mattox* court stated:

> We can agree that the physical proximity and the possibility of an integrated use of two separate tracts would give rise to an additional economic value to each, but it does not follow that the mere

proximity or possibility of the integrated use will confer upon the owner a right to severance damages. In addition to these factors, *there must exist a reasonable probability that the separate tracts would have been combined for such integrated use.* The error in the defendant's argument is that it does not reflect the realities of the situation. It fails to take into consideration the fact that when the defendant purchased the three tracts, the Government project was already well under way. Thus, the integrated use of the fee tract and mill site was if not actually impossible at least highly improbable. It offends our sense of justice that the Government should be required to pay the defendant an alleged damage to his fee tract which, if it occurred at all, occurred before he purchased.

The plan which constituted the basis for defendant's evaluation of his fee tract was doomed when the flood control project was initiated. This fact became more obvious as each step in the progress of the project took place. In 1949 the land for the dam site was acquired, and in 1950 the acquisition of land for the reservoir started. In that year too, the relocation was begun of the long neglected and dilapidated railway track which had served the mill site some 40 years previously. In 1956 the construction of the dam began, and it was a year in progress when defendant purchased his property. Projects of such importance do not take place in the wilds of the West Virginia mountains without widespread knowledge thereof throughout the community. The defendant's proffer of evidence and concessions of counsel in our court do not deny that he had knowledge of these background facts, *though he does apparently* [757] *contend that he had no personal knowledge that this particular 28.91-acre tract would be taken. We think the trial court's conclusion that the possibility that land lying on the banks of the Elk River, which was already being*

> *dammed, would be condemned was sufficient to make the defendant's joint use of that property too improbable to justify such use as a measure of damages in this case. Whether the defendant blindly or deliberately bought into the situation does not affect the improbability of his plan.* In *United States ex rel. TVA* v. *Powelson*, 319 U.S. 266, 275 (1943), in discussing this issue the Court said:
>
> "An owner of lands sought to be condemned is entitled to their 'market value fairly determined.' That value may reflect not only the use to which the property is presently devoted but also that use to which it may be readily converted (citing cases). In that connection the value may be determined in light of the special or higher use of the land when combined with other parcels; it need not be measured merely by the use to which the land is or can be put as a separated tract. *But in order for that special adaptability to be considered, there must be a reasonable probability of the lands in question being combined with other tracts for that purpose in the reasonably near future. In absence of such a showing, the chance of their being united for that special use is regarded 'as too remote and speculative to have any legitimate effect upon the valuation.'"*

375 F.2d at 463-464 (citations omitted and emphasis added). *See also, United States* v. *99.66 Acres of Land*, 970 F.2d 651, 657 (9th Cir. 1992); *United States* v. *1735 N. Lynn St.*, 676 F. Supp. 693, 700 (E.D. Va. 1987).

3. Highest And Best Use

The Supreme Court's *Powelson* decision (quoted in *Mattox, supra*) demonstrates that the reasonable probability of condemned property being combined with other tracts in the reasonably near future for some unitary use is also the standard applicable for determining whether such a unitary use may be considered the "highest and best use" of the condemned property.

As Judge Gilmore observed in his 1982 opinion in this case, "[O]ne of the basic principles of eminent domain law is that the condemnee is entitled to not just the value of his property as used at the time of the taking, but rather the value his property would command on the open market in light of the highest and most profitable use to which it might reasonably be devoted in the near future." *United States* v. *Certain Land*, 547 F. Supp. 680, 686-87 (E.D. Mich. 1982).

The "highest and best use" doctrine was explained by the Supreme Court in *Olson* v. *United States*, 292 U.S. 246, (1934):

> The sum required to be paid the owner does not depend upon the uses to which he has devoted his land but is to be arrived at upon just consideration of all the uses for which it is suitable. The highest and most profitable use for which the property is adaptable and needed or likely to be needed in the reasonably near future is to be considered, not necessarily as the measure of value, but to the full extent that the prospect of demand for such use affects the market value while the property is privately held. *The fact that the most profitable use of the parcel can be made only in combination with other lands does not necessarily exclude that use from consideration if the possibility of combination is reasonably* [758] sufficient to affect market value . . . . But the value to be ascertained does not include, and the owner is not entitled to compensation for, any element resulting subsequently to or because of the taking. Considerations that may not reasonably be held to affect market value are excluded. Value to the taker of a piece of land combined with other parcels for public use is not a measure of or a guide to the compensation to which the owner is entitled. The use of shorelands for reservoir purposes prior to the taking shows merely the physical possibility of so controlling the level of the lake. But physical adaptability alone cannot be deemed to affect market value. There must be a reasonable possibility

> that the owner could use his tract together with other shorelands for reservoir purposes or that another could acquire all lands and easements necessary for that use . . . .
>
> In respect of each item of property, that value may be deemed to be the sum which, considering all the circumstances, could have been obtained for it; that is the amount that in all probability would have been arrived at by fair negotiations between an owner willing to sell and a purchaser desiring to buy. *In making that estimate there should be taken into account all considerations that fairly might be brought forward and reasonably be given substantial weight in such bargaining. The determination is to be made in the light of all facts affecting the market value that are shown by the evidence taken in connection with those of such general notoriety as not to require proof. Elements affecting value that depend upon events or combinations of occurrences which, while within the realm of possibility, are not fairly shown to be reasonably probable should be excluded from consideration for that would be to allow mere speculation and conjecture to become a guide for the ascertainment of value—a thing to be condemned in business transactions as well as in judicial ascertainment of truth.*

292 U.S. at 257 (citations omitted).

Whether a landowner's proposed use is reasonable is a matter for the Court to decide. As Judge Gilmore correctly observed in 1982,

> It will be the responsibility of the Court at trial to screen the potential uses and exclude from jury consideration those uses which have not been demonstrated to be practicable and reasonable under the *Olson* test. *Olson* holds that in examining a proposed use a two-part test is applied: 1) a showing of reasonable probability that the land is both physically adaptable for such use, and 2) evidence

> that there is a need or demand for such use in the reasonably near future. *At trial, the Court will determine whether the land owner has produced credible evidence that a potential use is reasonable practicable and reasonably probable in the near future. If such credible evidence is produced, the jury will then decide whether the property's suitability for this use enhances its market value, and if so, by how much.*

547 F. Supp. at 687 (emphasis added). *See also, United States* v. *320.0 Acres, County of Monroe, Fla.*, 605 F.2d 762 (5th Cir. 1979) (the "*Everglades* " case) ("[I]t is the trial court's responsibility under Rule 71A(h) to screen all proffered potential use evidence and exclude from consideration by the trier of fact . . . alleged potential uses which have not been demonstrated to be practicable and reasonably probable . . . ."); *United States* v. *341.45 Acres of Land Located in County of St. Louis, Minnesota*, 633 F.2d 108, 111 (8th [759] Cir. 1980); *United States* v. *77.819.10 Acres of Land*, 647 F.2d 104, 110 (10th Cir. 1981), *cert. denied*, 456 U.S. 926.

Applying the foregoing to the facts of this case, the evidence presented in this case shows that the Government's intention to take the property was made public prior to the time that DIBCO purchased the parcels of property at issue. DIBCO had specific knowledge of the intended taking at least as of December 1976. [*See* Plaintiff's Ex. 27, letter from DIBCO president Roy Lancaster to Dennis Keilman, Director of the GSA Space Management Division, acknowledging DIBCO's awareness of the prospectus for the taking submitted by GSA to Congress.] Moreover, any integrated use of the condemned property with the Bridge was dependent upon the City of Detroit's vacating of 21st Street and Nash Sogoian's sale of his parcel of land to DIBCO. As of the date of taking, no steps were taken by DIBCO to effectuate the vacation of 21st Street and Defendant's own witnesses testified that Sogoian flatly refused to sell his property to DIBCO. Furthermore, even DIBCO president, Roy Lancaster, admitted in his deposition that any integrated

use of the property with the Bridge property was merely a "possibility." [*See* Lancaster 7/16/84 Deposition, p. 56.]

For these reasons, the Court finds that there was no reasonable probability of the property in question being combined and used in conjunction with Defendant's Ambassador Bridge property in the reasonably near future.

Furthermore, the evidence was overwhelming that DIBCO's intended integrated use of the property was for U.S. Customs to use it for truck inspection. *See* Plaintiff's Exhibits 23-30 and in particular Plaintiff's Ex. 26, Letter from Roy G. Lancaster, President of DIBCO to DIBCO's Carrier Customers ("Our land and warehouse facility located immediately adjacent to the east side of the Detroit plaza (formerly the Overland Western terminal) . . . was originally purchased by our Company in order to provide an expanded and efficient secondary truck inspection facility for U.S. Customs . . . .") and Plaintiffs Ex. 23, Lancaster November 10, 1977 Letter at Plaintiffs Ex. 23 ("The property has been vacant and available to U.S. Customs since July 11, 1977."). *See also*, Lancaster 7/16/84 Deposition, p. 56 ("We were primarily concerned with acquiring the [Overland] property for one basic purpose. To get started and to have Customs utilize it, the property for customs inspection.") In fact, all of DIBCO's witnesses testified that the property's intended use was for a Customs inspection facility. Indeed, this is what DIBCO told its shareholders was the reason for its purchase of the property.

In its 1977 Annual Report, DIBCO informed its shareholders that "the 3 1/2 acre trucking terminal property adjacent to the Detroit plaza of the Ambassador Bridge was purchased by the Company in June, 1977 so that it could be leased or resold for use by United States Customs as an examining warehouse for commercial vehicles entering the United States from Canada." [*See* Plaintiff's Ex. 30.] DIBCO even had prominent Detroit architects, Smith, Hinchman & Grylls, draw up site plans for use of the property as a Customs secondary truck inspection facility. [*See* Plaintiff's Ex. 29. *See also*, Lancaster Dep. pp. 70, 72.]

This use of the subject property to alleviate traffic congestion on the Bridge by providing Customs with a truck inspection facility off of the Bridge plaza, however, does not avail DIBCO. It is clear that this intended use of the as a Customs inspection facility obtains its value from the Government. As the Supreme Court made clear in [760] *United States* v. *Fuller*, 409 U.S. 488, 492 (1973), "the Government as condemnor may not be required to compensate a condemnee for elements of value that the Government has created." Moreover, it is well-settled that a highest and best use cannot be the use for which the Government is acquiring the property, unless there is a prospect and competitive demand for that use by entities other than the Government. *United States* v. *Chandler-Dunbar Water Power Co.*, 229 U.S. 53, 80-81 (1913); *United States* v. *320.0 Acres of Land*, 605 F.2d 762, 781 (5th Cir. 1979); *United States* v. *46,672.96 Acres of Land*, 521 F.2d 13. 15-16 (10th Cir. 1975); *United States* v. *Weyerhaeuser Co.*, 538 F.2d 1363, 1366, 1367 (9th Cir. 1976), *cert, denied*, 429 U.S. 929 (1976). DIBCO has not demonstrated that, other than for use by the Government, a cognizable market exists for Customs inspection facilities.

The foregoing authorities make clear that any value of the condemned property as a Customs inspection facility is non-compensable.

B. DIBCO Is Not Entitled To Compensation Based On Any Special Value Of The Property To DIBCO

Even if the Court were to find that DIBCO's intended integrated use of the taken property with the Bridge property was reasonably probable, it is well-settled that the fair market value for which an owner must be compensated is an objectively transferable market value. *See Kimhall Laundry Co.* v. *United States*, 338 U.S. 1, 5 (1949). Thus, fair market value does not include the special value of property to the owner arising from its unique adaptability to his particular use. *United States* v. *564.54 Acres of Land*, 441 U.S. 506, 511-12 (1979); *United States* v. *Cors*, 337 U.S. 325, 332 (1949); *United States* v. *Petty Motor Co.*, 327 U.S. 372 (1946). As the Sixth Circuit explained in *United States for the use of*

the Tennessee Valley Authority v. *Easement and Right of Way 100 Feet Wide*, 447 F.2d 1317 (6th Cir. 1971) (the "*Hadley*" case),

> It is also well accepted that the fair market value for the highest and best use of the property is the generally accepted standard for demonstrating "just compensation" when property is taken by condemnation.
>
> Just compensation includes all elements of value that inhere in the property, but it does not exceed market value fairly determined. The sum required to be paid the owner does not depend upon the uses to which he has devoted his land but is to be arrived at upon just consideration of all the uses for which it is suitable. The highest and most profitable use for which the property is adaptable and needed or likely to be needed in the reasonably near future is to be considered, not necessarily as the measure of value, but to the full extent that the prospect of demand for such use affects the market value while the property is privately held.
>
> Thus, the law recognizes that while consideration must be given to the adaptability of the property in the future *just compensation is not the value to the owner for his peculiar purpose*; and it is generally accepted that there must be demonstrated an actual profitable use or a market demand for the prospective use.

447 F.2d at 1319 (citations omitted).

The *Hadley* case involved the taking of an easement over the defendant's farm [761] property for a high tension transmission line. The owner of the farm was also the president and majority stockholder of a construction company which owned an airplane used for the purpose of transporting personnel to various construction projects. The plane was routinely hangered and serviced at an airport located approximately 25 miles away. Without any knowledge of the proposed TVA transmission line, Hadley conceived the plan of locating a private airfield on his farm which he would then

lease to the company of which he was president. He contended that the farm property over which the TVA took an easement had a substantial additional value because of the plans for construction of the airfield.

The court found that the airfield would have been built if the condemnation had not occurred. But the court also found that the highest and best use for the land involved was for agricultural purposes and held that the owner of the farm was not entitled to recover for the personal and peculiar value to him of the use of a portion of the property taken for an airfield. 447 F.2d at 1319. The court also found that the landowner was not entitled to recover for frustration of his plans to construct the airstrip. *Id. See also, United States ex. rel. TVA* v. *T. Indus. Inc.*, 489 F.2d 921, 925 (6th Cir. 1974) ("frustration of future business plans is not compensable" even if there is concrete evidence of such plans); *United States* v. *1735 North Lynn Street, supra*, 673 F. Supp. 693, 701 (E.D. Va. 1987) (consequential damages for the frustration of renovation and rental plans are impermissible in federal condemnation proceedings). As succinctly stated by the Supreme Court in *United States ex rel. TVA* v. *Powelson*, 319 U.S. 266, 281-82 (1943), "[T]he sovereign must pay only for what it takes not for the opportunities which the owner may lose."

In this case, Defendant's expert, William Walsh, testified, in part, that the highest and best use of parcels A1 and A3 was their use as an integrated part of the Ambassador Bridge to expand the Bridge Plaza and improve traffic flow off the Bridge, such that Bridge revenues would be increased. The value he attributed to this use was $50.00 per square foot. He then opined that the Government's taking destroyed DIBCO's capacity to create an expanded plaza, i.e., that DIBCO's desired use of the property was frustrated by the taking.

Mr. Walsh's proffered highest and best use of the taken property is clearly a special use to DIBCO, as it obviously rests on its integrated use with the Bridge. Mr. Walsh, in fact, admitted this. There is no independent value in the

market place for this use. Therefore, the jury will not be permitted to base its determination of just compensation due to DIBCO based upon this special use or frustration of its plans. *See United States* v. *An Easement and Right of Way 100 Feet Wide, supra*; *United States ex rel. T.V.A.* v. *T. Indus., Inc., supra*. Accordingly, the jury will be instructed to disregard Mr. Walsh's testimony regarding this use.[3]

Although DIBCO is not entitled to compensation based upon the integrated use of the subject property with the Bridge, there is no rule of law that precludes [762] DIBCO from taking advantage of the property's location proximate to the Bridge in its valuation of the property. In addition to his testimony regarding the integrated use of the property with the Bridge property, Mr. Walsh testified that the taken property could also be used for other purposes, such as a bonded warehouse, or for the relocation of one or more of the ancillary enterprises presently located on the Bridge plaza, and that used in such a capacity, the property would have an enhanced value by virtue of its proximity to the Ambassador Bridge. The jury may consider such other uses and the enhanced value of the property created by its proximity to the Bridge.

CONCLUSION

For all of the foregoing reasons, the jury will be asked to determine only (1) whether the highest and best use of the taken property is the Government's proffered highest and best use of the property as a truck terminal or DIBCO's proffered highest and best use of the property as a bonded warehouse or some other such facility having an enhanced market value due to the property's proximity to the Ambassador Bridge; and (2) the amount of just compensation to be paid to DIBCO based upon this determination of the highest and best use of the property.

---

[3] Based upon the Court's ruling on this issue, Defendant's "Motion for a Judgment as a Matter of Law" in which DIBCO asks that the Court rule as a matter of law that the highest and best use of parcel three is to relieve traffic from the Ambassador Bridge is DENIED.

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,
Plaintiff,

vs.

CERTAIN LAND SITUATED IN THE CITY OF DETROIT, et al.,
Defendants.

Nos. 79-CV-73934-DT
Hon. Gerald E. Rosen

ORDER FOR BRIEFS ON INTEREST CALCULATION

At a session of said Court, held in
the U.S. Courthouse, Detroit, Michigan
on 27 FEB 2002

PRESENT: Honorable Gerald E. Rosen
United States District Judge

The parties having stipulated prior to trial that the amount of interest due and owing to Detroit International Bridge Company on the Judgment would be determined by the Court,

IT IS HEREBY ORDERED that the parties should attempt to stipulate to the amount of interest due on the Judgment. However, in the event that the parties are unable to so stipulate,

IT IS ORDERED that within two weeks of the date of this Order, the parties shall file with the Court and serve upon their opponent briefs no longer than 10 pages in length

concerning the amount of interest owed to Detroit International Bridge Company and the basis/bases for their calculation of said interest.

/s/

Gerald E. Rosen
United States District Judge

APPENDIX E

PROSPECTUS NUMBER: PMI-76011

PROSPECTUS FOR PROPOSED ACQUISITION
AND ALTERATION UNDER THE PUBLIC
BUILDINGS ACT OF 1959, AS AMENDED

BORDER STATION
SECONDARY TRUCK INSPECTION

DETROIT, MICHIGAN

1. DESCRIPTION OF PROPOSED PROJECT:

This prospectus proposes the acquisition and alteration of a privately owned truck terminal/warehouse facility, adjacent to the existing Ambassador Bridge Border Station in Detroit, Michigan, to provide adequate truck inspection facilities for the U.S. Customs Service. This facility consists of a land area of about 148,000 square feet, improved with a structure of approximately 19,450 square feet of which 14,100 square feet is warehouse space and 5,350 square feet is office space. In addition, about 24,000 square feet of land, consisting of several contiguous lots, will be acquired so that adequate truck parking, docking and maneuvering space, and ingress and egress lanes may be provided. Accordingly, the total land area of the proposed project is approximately 172,000 square feet. Certain modifications to the existing building and the site (fencing, lighting, paving, primary inspection gatehouse, etc.) in the amount of $833,000 are necessary. It is planned to retain the existing secondary truck inspection facility, located at the American terminus of the bridge, for automobile inspection operations. The renovated facility will contain about the same amount of warehouse and office space now provided in the existing facility. The total project cost (including site and relocation costs), is estimated to be $2,559,000.

2. COMPREHENSIVE PLAN:

a. PROJECT NEED:

The existing secondary truck inspection facility at the Ambassador Bridge was constructed about 45 years ago to accommodate the relatively small trucks and the low traffic volume at that time. It is a single story building located near the main traffic lanes from the primary inspection booths at the entrance to the bridge. The facility has only [2] seven truck inspection bays which are inadequate to accommodate the approximately 35,000 trucks which enter the United States monthly at the crossing. As many as 1,600 trucks have entered the country in a single day at this crossing. Traffic delays in excess of 4 hours are frequently incurred. The truck maneuvering area also is extremely limited and does not provide sufficient space for trucks to either wait for inspection or for maneuvering to park at the inspection bays. Drivers frequently must park on the bridge or in the automobile inspection lanes while waiting and when space is available for inspection, the automobile lanes are used for truck maneuvering to dock at the facility.

As a result, there is great confusion and delays in processing traffic through the border station. Larger, more conveniently located truck inspection facilities are needed to achieve an orderly, efficient inspection operation.

The proposal to acquire the adjacent truck terminal/warehouse facility was developed after giving full consideration to other alternatives, recognizing the need to maintain strict security and control over the large volume of truck traffic entering the United States over the Ambassador Bridge.

b. DISCUSSION OF ALTERNATIVES:

1. Utilization of Government-owned space.

There is no Government-owned space available in Detroit that could be utilized to satisfy the special purpose/location requirements of the U.S. Customs Service. This alternative was, therefore, considered infeasible.

2. Acquisition of leased space.

The acquisition of leased space was first pursued as a method to provide adequate inspection facilities for the U.S. Customs Service. However, none of the offers received as a result of our solicitation for offers meets the location requirement of Customs, i.e., a location in this immediate area of the entrance to the bridge. Thus, acquiring lease space to satisfy the special purpose space location requirements of Customs was found to be infeasible.

[3] 3. Purchase of an existing building.

Adjacent to the existing border station facilities at the Ambassador Bridge is a truck terminal/warehouse facility owned by Overland Western, Limited, of Detroit. With certain modifications and an expansion in its site size, it could satisfy the requirements of the U.S. Customs Service. It fully meets the location requirement of Customs and with the acquisition of a few small contiguous lots, it would provide the necessary space for truck parking, maneuvering, and ingress and egress lanes.

The terminal facility itself is well constructed and large enough to provide the amount of office space and truck docking bays necessary to ensure efficient and timely inspection of truck traffic entering the United States. Cost estimates comparing the purchase price and renovation costs with the cost of direct Federal construction (see below) indicate that purchase and renovation would be the least costly method of adequately satisfying the long range needs of Customs. This alternative, therefore, was selected as being the most desirable and in the best interests of the Government.

4. Direct Federal construction.

Direct Federal construction was considered as a feasible alternative in satisfying the needs of the U.S. Customs Service. However, since the most desirable site that could be acquired for such construction would be the Overland Western site discussed in alternative 3, pursuing the direct construction course of action would entail the demolition of the

existing truck terminal/warehouse and construction of a more modern facility. An estimate of the cost of such a plan exceeded the cost of alternative 3 by $1.27 million. The direct Federal construction alternative was, therefore, dismissed as being economically imprudent.

Summary: Four alternatives were considered in planning to satisfy the U.S. Customs Service's needs for larger and more conveniently located secondary truck inspection facilities at the Ambassador Bridge, i.e., utilization of Government-owned space, acquisition of lease space, purchasing and altering an existing building, and direct Federal construction.

[4] The first, utilization of Government-owned space, was rejected early in the planning process since there is no Government-owned space in Detroit that would satisfy the special purpose/location requirement of the U.S. Customs Service. Of the remaining three alternatives, the acquisition of leased space was considered initially to be the most viable and timely solution to satisfying the Custom Service's needs. However, all of the locations offered as a result of our efforts to acquire suitable leased space were rejected by the U.S. Customs Service as being too far from the entrance to the bridge which would create significant security problems for the U.S. Customs Service. Customs officials advised us that locating the secondary inspection facility beyond eye contact of the primary inspection area would provide the opportunity for increased smuggling of contraband into the United States which would be operationally inconsistent with their extensive efforts to curb its flow. This is particularly significant in view of the high volume of cargo trucks that enter the United States over the Ambassador Bridge. As a result, acquisition of suitable leased space is considered infeasible.

The two remaining alternatives, purchasing and renovation of an existing facility and direct Federal construction, were both found to be viable. However, due to the special purpose/location nature of the agency requirements, direct construction would have most probably involved the same site as the facility herein proposed for purchase and altera-

tion. Therefore, since both alternatives would be obviously equal in terms of location and since the existing facility is structurally sound, cost was the single factor in deciding which course of action was the more desirable. Accordingly, cost estimates were made to determine whether in this instance, it would be cheaper to purchase and renovate the existing building or to purchase and demolish the existing building and construct a new modern facility. The preliminary estimate for demolishing and constructing a new facility indicated that the cost of new construction would exceed renovation by approximately $1.27 million. Since no tangible benefits would be derived in expending such funds other than providing a more modern facility, purchase and renovation was selected as the most desirable alternative and is so proposed herein.

[5] 3. ESTIMATED MAXIMUM PROJECT COST:

Acquisition end Relocation	$1,637,000
Design & Review	60,000
Alteration (January 1978)	833,000*
Management and Inspection	29,000
Total Project Cost	$2,559,000

*For description of alteration work, see the attached.

4. CURRENT HOUSING COST:

For agency to be housed in the proposed project.

	Area (Sq. Ft.)	Annual Cost
Leased:	30,890	$49,500
Net Rent		0
Services provided by Lessor		($34,500)
Services provided by Government		($15,000)
Government-owned	0	0
Total	30,890**	$49,500

**This figure includes 19,000 square feet of surface parking, 7,850 square feet of truck inspection space, and 4,400 square feet of office space.

5. COMPREHENSIVE HOUSING PLAN:

Since this proposal does not involve the relocation of any Federal activities, a comprehensive housing plan has not been included herein.

6. PRESENT VALUE ANALYSIS AND OTHER SUPPORT DATA:

Since leasing was found to be an infeasible alternative in satisfying agency needs, there is no present value analysis contained herein. For other support data, see the attached.

[6] 7. STATEMENT OF NEED:

It has been determined that [1] the need for space of the Federal Government in the area cannot be satisfied by the utilization of existing property owned by the Government, and [2] suitable rental space is not available.

Submitted at Washington, D.C. on June 4, 1976

Recommended: /s/
Commissioner, Public Buildings Service

Approved: /s/
Acting Administrator

SUPPORT DATA
AMBASSADOR BRIDGE
DETROIT, MICHIGAN

I. COMMUNITY PROFILE:

Detroit, Michigan, is the fifth largest city in the United States, located in the southeast portion of the State about 90 miles from the city of Lansing, the State Capital. The population of Detroit, as of 1974, is 1.4 million with the Detroit Standard Metropolitan Statistical Area having a population of about 4.5 million.

Detroit is a major cultural and educational center for the State of Michigan and is a world renown manufacturing center, particularly for automobiles. Approximately 27 percent of our Nation's motor vehicles are made in Detroit. The city is also prominent in the production of machine tools and accessories, metal stampings, drugs, paints and varnishes, office machinery, and industrial chemicals. The highest source of employment in the city is in the retail trades, employing 13 percent of the city's labor force; the next highest source of employment is the manufacturing industry, employing 12 percent of the labor force.

GSA controlled space in Detroit totals approximately 4,802,000 square feet consisting of 2,367,000 square feet of Government-owned space and 2,435,000 square feet of leased space.

II. ENVIRONMENTAL DATA:

In the development of this project, studies will be made of the water supply, sewage disposal, solid waste disposal, storm water drainage, erosion control, fuel types, etc., in order to comply strictly with the purposes and intent of Executive Order 11514, "Protection and Enhancement of Environmental Quality", and will comply with the requirements of Section 102(2)(C) of the National Environmental Policy Act of 1969 (P.L. 91-190), as amended, and the guidelines prescribed by the Council on Environmental Quality.

III. HOUSING:

No agency personnel will be relocated as a result of this project and, therefore, the housing of Federal employees will not be affected.

[2] IV. CONSIDERATION UNDER THE RURAL DEVELOPMENT ACT OF 1972 (P.L. 92-419:

As required under this Act, first priority consideration was given for the location of this facility in a rural area. However, the special purpose functions of the U.S. Customs Services can only be efficiently performed at the proposed location.

V. PARKING AND TRANSPORTATION:

Parking space with adequate access and maneuvering area for a minimum of 40 trucks (in addition to the 42 docking spaces) and 24 automobile spaces is included in the proposed project. The number of truck parking spaces is an estimate of the additional spaces needed for trucks that must wait to be inspected during peak traffic flow periods.

Twelve automobile parking spaces will be allocated to employees and twelve will be allocated to visitors. The ratio for employee parking is a little more than 2 to 1. In determining this ratio, consideration was given to two primary factors. First, the inspection operations are a 24 hour a day function and the public transportation is considered inadequate during the night hours. Second, the area of the border crossing is located in a light industrial and declining residential neighborhood and it is considered less than safe for individuals to walk the streets or wait for a bus during the night hours. Thus, employee safety factors indicate a need for a higher ratio of employee parking than in most urban locations where Federal activities are generally limited to normal working hours. The 12 visitor parking spaces are considered as a minimum to handle the number of customs brokers and other visitors that will be doing business with Customs officials and truckers.

The city zoning ordinances which are applicable to the area where the bridge plaza is located require one parking space for each 800 square feet of floor area. The planned parking for the proposed project is consistent with that requirement.

It is anticipated that the proposed project will not have any adverse impact on public transportation. Transportation, in general, in the area of the bridge is expected to improve significantly with the elimination of the confusion and disruption now caused by inefficient truck inspection operations.

[3] VI. PROTECTION AND ENERGY CONSERVATION:

In the renovation of the facility to be acquired, GSA will ensure, to the greatest extent practicable, that the latest in fire protection, security, energy conservation features, and provisions for the handicapped are provided.

VII. STANDARD LEVEL USER CHARGE (SLUC) AND SPACE UTILIZATION:

Space to be provided in the proposed project will have four major classifications: office, warehouse storage, light industrial, and parking. The estimated FY 77 SLUC rates for those classifications of space in the Detroit area are as follows:

Office: $9.66 per square foot
Warehouse: $1.34 per square foot
Light Industrial: $7.07 per square foot
Parking (outside): $1.29 per square foot

The space utilization rate in the proposed facility for the non-warehouse type space is about 197 square feet per person. However, this cannot be compared equitably with an overall nationwide space utilization rate because of the special purpose requirements needed at the facility.

VIII. PLANNING COORDINATION:

As required by the Intergovernmental Cooperation Act of 1968 (P.L. 90-577) and Executive Order 11512, the development of the proposed project has been coordinated with Federal, State, and local agencies. It has been found to be compatible with other plans and would have a positive effect on the local community.

BEST AVAILABLE COPY

IX. PRESENT AGENCY HOUSING AS OF 11/75:

	Square Feet	Annual Cost	Expiration	Cancellation	Class	Quality Rating	Disposition
A. Leased Space to the Proposed Project:	None	-	-	-	-	-	-
Subtotal	None	-	-	-	-	-	-
B. Leased Space to Remain:							
Border Station Ambassador Bridge Plaza 1227-21st Street 1/	30,890	$49,500	7/31/78	Firm	B	74	Retain
Subtotal	30,890	$49,500					
Total Leased	30,890	$49,500					
C. Government-owned Building(s) to be disposed of:	None	-					
Subtotal	None	-					
Total Government-owned	None	-					
Total Space	30,890	$49,500					

1/ This figure includes approximately 19,000 square feet of unassigned surface area for maneuvering and detention of cargo vehicles, 7,850 square feet of office type space. The 19,000 square feet of surface area will be released upon occupancy of the new facility.

DESCRIPTION ALTERATION OF WORK	COST
Install fire alarm system	$ 7,000
Install communication system	3,000
Install sprinkler system	20,000
Replace and install security fence with gates	64,000
Install security lighting	81,000
Upgrade electrical system	75,000
Upgrade existing office space	27,000
Provide office space in warehouse	46,000
Build guard house	6,000
Install flagpole	6,000
Remove and replace deteriorated paving	186,000
Replace bumpers at property perimeter	16,000
Repairs to existing heating and A/C system	35,000
Install additional A/C	46,000
Repairs to existing plumbing	8,000
Modernize restrooms	12,000
Repair warehouse roof	29,000
Replace damaged warehouse steel doors	151,000
Painting	15,000
Total estimated construction cost	$853,000

[Remainder of Prospectus omitted]

APPENDIX F

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,
Plaintiff,

— vs —

CERTAIN LAND SITUATE[D] IN THE CITY OF DETROIT, [et al.],
Defendants.

CIVIL ACTION NO. 973934
Honorable Ralph B. Guy

[STAMP: FILED Oct. 11 11:35AM '79
Clerk, U.S. District Court
East. Dist. Mich.]

COMPLAINT IN CONDEMNATION

The United States of America, Plaintiff, by and through James K. Robinson, United States Attorney, and Samuel J. Behringer Jr, Assistant United States Attorney, both for the Eastern District of Michigan, states the following cause of action against the above styled defendants.

1. This is a civil action brought by the United States of America for the taking of property under the power of eminent domain and for the ascertainment and award of just compensation to all owners and parties in interest of the taken property.

2. Inasmuch as the United States of America is the plaintiff, this Court has jurisdiction. 28 U.S.C. §1345.

3. The authority for the taking is the Act of August 1, 1888 (25 Stat. 357, 40 U.S.C. 257), as amended; the Act of February 26, 1931 (46 Stat. 1421, 40 U.S.C. 258a); the Federal Property and Administration Services Act of 1949, 63 Stat. 377, as amended; the Public Buildings Act of 1959, 73 Stat. 479, as amended; and the Prospectus, PMI-76011, approved by the House Committee on Public Works and Transportation on

4. The use for which the property described below in Paragraph 5 and Schedule "B" annexed hereto is that said land has been selected for acquisition by the United States in connection with the construction and maintenance of a Border Station and for such other uses as may be authorized by Congress or by Executive Order.

5. The estate or interest in the property taken for said public use is the full fee simple title, subject, however, to the right of the owners of public utility facilities, if any, upon, or under the land, to remove such facilities.

6. The property so to be taken is specifically described as

(a) PARCEL 1

A parcel of land located in the City of Detroit, Wayne County, Michigan and being Lots of 90, 94 & 95 of (Preston's) Subdivision of part of Private Claim 729 north of Fort Street as recorded in Liber 1, on page 265, of Plats, Wayne County Records, and being more particularly described as follows:

Commencing at the intersection of the westerly line of Twentieth Street (50 feet wide) and the northerly line of Howard Street (50 feet wide) said point also being the southeasterly corner of Lot 52 of said (Preston's) Subdivision of Part of Private Claim 729 and proceeding thence S. 77 Degrees 44' 25" W., a distance of 244.94 feet along said north line of Howard Street (50 feet wide) to a point, said point being the intersection of north line of Howard Street (50 feet wide) and the east line of Twenty

First Street (60 feet wide) said point being the southwesterly corner of Lot 51 of said Subdivision of Private Claim 729;

Thence N. 163 Degrees 30' 00" W., along the easterly line of Twenty First Street (60 feet wide) a distance of 580.27 feet to a point, said point being the southwesterly corner of Lot 90 of the Subdivision of Part of Private Claim 729, and point of beginning of the parcel herein described;

Thence N. 16 Degrees 30' 00" W., and continuing along the easterly line of Twenty First Street (60 feet wide) a distance of 122.50 feet to a point, said point being the intersection of the easterly line of Twenty First Street (60 feet wide) and the southerly line of Porter Street (50 feet wide) also being the northwesterly corner of Lot 95 of said Subdivision of Part of Private Claim 729;

Thence S. 14 Degrees 24' 08" E., along the west line of a Public Alley (20 feet wide) a distance of 112.40 feet to a point, said point being the southesasterly corner of said Lot 90;

Thence S. 73 Degrees 30' 00" W., along the southerly line of said Lot 90 a distance of 133.71 feet to the point of beginning of the parcel herein described.

Containing 15950.95 square feet of land more or less.

(b) PARCEL 2

A parcel of land located in the City of Detroit, Wayne County, Michigan and being Lot 87 of (Preston's) Subdivision of part of Private Claim 729 north of Fort Street as recorded in Liber 1, on Page 265, of Plats, Wayne County Records and being more particularly described as follows:

Commencing at the intersection of the westerly line of Twentieth Street (50 feet wide) and the

northerly line of Howard Street (50 feet wide) said point also being the south-easterly corner of Lot 52 of said (Preston's) Subdivision of Part of Private Claim 729 and proceeding thence S. 77 44' 25" W., a distance of 244.94 feet along said northerly line of Howard Street (50 feet wide) to a point, said point being the intersection of northerly line of Howard Street (50 feet wide) to a point, said point being the intersection of northerly line of Howard Street (50 feet wide) and the easterly line of Twenty First Street (60 feet wide) said point being the southwesterly corner of Lot 51 of said Subdivision of Private Claim 729;

Thence N. 16 Degrees 30' 00" W., along the easterly line of Twenty First Street (60 feet wide) a distance of 550.27 feet to a point, said point being the southwesterly corner of Lot 87 of the Subdivision of Part of Private Claim 729, and the point of beginning of the parcel herein described;

Thence continuing along the easterly line of Twenty First Street (60 feet wide) a distance of 30.00 feet to a point, said point being the northwesterly corner of said Lot 87;

Thence N. 73 Degrees 30' 00" E., along the northerly line of said Lot 87 a distance of 133.71 feet to a point of said point being the northeasterly corner of said Lot 87;

Thence S. 14 Degrees 24' 08" E., along the easterly line of said Lot 87 which is also the westerly line of a Public Alley (20 feet wide) a distance of 30.02 feet to a point, said point being the southeasterly corner of said Lot 87;

Thence S. 73 Degrees 30' 00" W., along the southerly line of said Lot 87 a distance of 132.61 feet to the point of beginning, of the parcel herein described.

Thence S. 14 Degrees 24' 08" E., along the easterly line of said Lot 87 which is also the westerly line of a Public Alley (20 feet wide) a distance of 30.02 feet to a point, said point being the southeasterly corner of said Lot 87;

Thence S. 73 Degrees 30' 00" W., along the southerly line of said Lot 87 a distance of 132.61 feet to the point of beginning, of the parcel herein described.

Containing 3994.83 square feet of land more or less.

A parcel of land located in the City of Detroit, Wayne County, Michigan and being Lots 51-86 both inclusive the south 10.00 feet of Lot 88 of (Preston's) Subdivision of part of Private Claim 729 north of Fort Street as recorded in Liber 1, on page 265, of Plats, Wayne County Records and being more particularly described as follows:

Beginning at the intersection of the westerly line of Twentieth Street (50 feet wide) and the northerly line of Howard Street (50 feet vide) said point being the southeasterly corner of Lot 52 of said (Preston's) Subdivision of Part of Private Claim 729 and proceeding thence S. 77 Degrees 44' 25" W., a distance of 244.94 feet along said northerly line of Howard Street (50 feet wide) and the easterly line of Twenty First Street (60 feet wide) said point being the southwesterly corner of Lot 51 of said Subdivision of Private Claim 729;

Thence N. 16 Degrees 30' 00" W., along the easterly line of Twenty First Street (60 feet wide) a distance of 550.27 feet to a point, said point being the northwesterly corner of Lot 86 of the Subdivision of Part of Private Claim 729;

Thence N. 73 Degrees 30' 00" E., along the northerly line of said Lot 86 of the Subdivision of Part of Private Claim 729, a distance of 132.61 feet to a

point, said point being the northeasterly corner of said Lot 86;

Thence N. 14 Degrees 24' 8" W., along the westerly line of a Public Alley (20 feet wide) a distance of 2.412 feet to a point;

Thence N. 77 Degrees 45' 34" E., along the southerly line of a Public Alley, (20 feet wide) a distance of 153.04 feet to a point in the Westerly line of Twentieth Street (50 feet wide);

Thence S. 12 Degrees 18' 17" E., along said westerly line of Twentieth Street (50 feet wide) a distance of 560.93 feet to the point of beginning of the parcel herein described.

Containing 147,976,40 square feet of land more or less.

As also described in annexed Schedule "B" hereto.

7. The persons known to the plaintiff to have or claim an interest in the aforesaid property are:

(a) PARCEL 1

The Detroit International Bridge Company, a Michigan Corporation, which is believed to hold full fee simple title subject to the rights, if any, of owners of public utility facilities.

(b) PARCEL 2

Nash P. Sogoian, 1471 21st Street, Detroit

8. The Treasurer of the City of Detroit is also joined as a party-defendant to this action because plaintiff is informed and believes that City and school taxes together with subsequently accuring [sic] interest, fees and penalities [sic] are outstanding and have not been paid upon each of the Parcels described above.

WHEREFORE the plaintiff demands judgment that the property be condemned and that just compensation for the taking be ascertained and awarded and for such other relief as may be lawful and proper.

JAMES K. ROBINSON (P19523)
United States Attorney

By /s/
SAMUEL J. BEHRINGER JR (P23751)
Assistant United States Attorney
Attorneys for Plaintiff
817 Federal Building & U.S. Courthouse
Detroit, Michigan 48226
(313) 226-4383

DATED:

APPENDIX G

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,
Plaintiff,

vs.

CERTAIN LAND SITUATED IN THE CITY OF DETROIT, WAYNE COUNTY, MICHIGAN, et al.,
Defendants.

Civil Nos. 79-CV-73934-DT
Hon. Gerald E. Rosen

[STAMP: FILED '02 APR -5 P3:37
U.S. DIST. COURT CLERK
EAST. DIST. MICH.
DETROIT]

AFFIDAVIT OF JONATHAN D. VANDERVEEN

STATE OF Illinois)
) SS
COUNTY OF Cook)

I, JONATHAN D. VANDERVEEN, being first duly sworn, state and declare:

1. I am a partner in the Dispute Consulting Services Group, part of the Financial Advisory Services practice of Deloitte & Touche. My qualifications and curriculum vitae are included in my March 12, 2002 Affidavit. All of the opinions presented in this report are based upon my analysis of the information available to me and my experience, educa-

tion and expertise. As part of my research, I utilized a team of Deloitte & Touche personnel who worked at my direction and control.

2. I prepared this Affidavit in response to a request by counsel, Dykema Gossett PLLC, on behalf of its client, the Detroit International Bridge Company ("DIBC").

* * * *

Exhibit 13

Jury Damages Award and
Prejudgment Interest Summary

Jury Damages Award[1] $ 3,270,174

Prejudgment Interest Rate	Prejudgment Interest	Jury Damages Award plus Prejudgment Interest[2]
20-year Constant Maturity Treasury Bond Yield	$ 37,240,623	$ 40,237,094
Moody's Long Term Corporate Bond (Baa Rating) Yield Average (Anniversary Date Basis)	$ 27,108,861	$ 30,379,035
Weekly Average Prime Rate Plus 1/2% (Anniversary Date Basis)	$ 26,384,567	$ 29,654,741
Weekly Average Prime Rate (Anniversary Date Basis)	$ 23,518,568	$ 26,788,742
Moody's Long Term Corpo-	$ 21,047,017	$ 24,317,191

[1] Equals amount awarded by the jury on February 20, 2002 less Government's remittance to DIBC on 02/27/80 ($828,000).

[2] Reflects the damages awarded plus interest accrued from date of the Declaration of Taking, October 11, 1979, to the judgment date of February 20, 2002.

rate Bond (Aaa Rating) Yield Average (Anniversary Date Basis)		
IRS Overpayment Rates Specified in Title 26, Sec. 6621 of the U.S. Code (Anniversary Date)	$ 20,484,079	$ 23,754,253
1-year Constant Maturity Treasury Bill Yield Specified in 40 U.S.C.A. §258e-1 (Anniversary)	$ 12,873,452	$ 16,143,626

APPENDIX H

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,
Plaintiff,

vs.

CERTAIN LAND SITUATED IN THE CITY OF DETROIT, WAYNE COUNTY, MICHIGAN, et al.,
Defendants.

Civil Nos. 79-CV-73934-DT
Hon. Gerald E. Rosen

[STAMP: FILED 2002 MAY 31 P2:13
U.S. DIST. COURT CLERK
EAST. DIST. MICH.
DETROIT]

AFFIDAVIT OF JONATHAN D. VANDERVEEN

STATE OF Illinois)
) SS
COUNTY OF Cook)

I, JONATHAN D. VANDERVEEN, being first duly sworn, state and declare:

1. I am a partner in the Dispute Consulting Services Group, part of the Financial Advisory Services practice of Deloitte & Touche. My qualifications and curriculum vitae are included in my March 12, 2002 Affidavit. All of the opinions presented in this report are based upon my analysis of the information available to me and my experience, education and expertise. As part of my research, I utilized a team

of Deloitte & Touche personnel who worked at my direction and control.

2. This is prepared Affidavit in response to a request by counsel, Dykema Gossett PLLC, on behalf of its client, the Detroit International Bridge Company ("DIBC").

* * * *

Exhibit 20

Jury Damages Award and Prejudgment Interest Summary

Jury Damages Award[1] $ 3,270,174

Prejudgment Interest Rate	Prejudgment Interest	Jury Damages Award plus Prejudgment Interest[2]
30-year Constant Maturity Treasury Bond Yield	$ 40,732,947	$ 43,732,842
20-year Constant Maturity Treasury Bond Yield (Anniversary Date Basis)	$ 37,240,623	$ 40,237,094
30-year Constant Maturity Treasury Bond Yield with GSA Lease Rate (Anniversary	$ 27,890,311	$ 31,160,485
GSA Lease Rate (Anniversary Date Basis)	$ 26,974,031	$ 30,244,205
Weekly Average Prime Rate Plus 1/2% (DIBC Borrowing Rate (Anniversary Date	$ 26,384,567	$ 29,654,741

[1] Equals amount awarded by the jury on February 20, 2002 less Government's remittance to DIBC on 02/27/80 ($828,000).

[2] Reflects the damages awarded plus interest accrued from date of the Declaration of Taking, October 11, 1979, to the judgment date of February 20, 2002.

APPENDIX I

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA
Plaintiff,

Case Nos. No. 79-78934
96-75494
96-75475
01-70391

CERTAIN LAND SITUATED IN
THE CITY OF DETROIT
WAYNE COUNTY, MICHIGAN, et al.

Volume 2

JURY TRIAL PROCEEDINGS
BEFORE THE HONORABLE GERALD E. ROSEN
United States District Judge
859 US Courthouse & Federal Building
231 Lafayette Boulevard West
Detroit, Michigan
Monday, February 11, 2002

APPEARANCES:

RAYMOND HAMILTON, ESQ.,
Assistant United States Attorney
U.S. Department of Justice
P.O. Box 607
Albuquerque, NM 87103
On behalf of the Government

REPORTED STENOGRAPHICALLY BY:
Carol S. Sapala, RMR-FCRR
Ronald DiBartolomeo, CSR

[162] APPEARANCES (continuing):

MATTHEW S. CLIFFORD, ESQ.,
U.S. Department of Justice
P.O. Box 561 Ben Franklin Station
Washington, D.C. 20044
On behalf of the Government.

CRAIG JOHN, ESQ.,
DYKEMA GOSSET
201 W. Big Beaver Road, Ste. 500
West Bloomfield, MI 48084
On behalf of Defendant Bridge Company.

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[164] EXHIBITS

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Plaintiff's Exhibit Number 7	212
Plaintiff's Exhibit Number 21	200

[165] Detroit, Michigan
February 11, 2002
2:28 p.m.

(Whereupon the jury was brought out into the courtroom at 2:25 p.m.)

THE COURT: Counsel satisfied the jurors our in place?

MR. HAMILTON: Yes, Your Honor.

MR. JOHN: Yes, Your Honor.

* * * *

[190] THE COURT: Thank you, Mr. John. Let's get through some witnesses.

THE COURT: Mr. Hamilton if you would call your [191] first witness, please.

MR. HAMILTON: United States would call David Hood, Your Honor.

(Whereupon the witness was then sworn)

THE COURT: I want to advise counsel that at a quarter of four. We have to switch Court Reporters. Give and spell your full name.

THE WITNESS: The name is initial J. David, D-a-v-i-d, Hood, H-o-o-d.

DIRECT EXAMINATION

* * * *

[222] BY MR. HAMILTON:

Q. Now Mr. Hood, just again for the record, because it is very important, the initial thinking about this tract, your personal knowledge was generated in 74 time frame, correct?

A. Excuse me. Could you state that again so I understand exactly how you are asking that question?

Q. The initial focus of Customs, vis-via this particular tract, located at the Overland Western Plaza initiated what time frame?

A. Interest began in 1974. In particular what was reduced into a formal document requesting GSA focusing actions on

that parcel was November 11, 1974 when the aforementioned report was submitted to GSA.

THE COURT: Was that the predicate action for GSA to take the action it did in initiating the legislative condemnation process with that Prospectus in 1976?

THE WITNESS: Yes, your Honor. The importance of the document in Customs, normally a project proposal would not identify specific site, only identify the need for nature and scope of the project in the associated budget request. After Congress authorized and funded, we competitively seek and to create a facility. In this particular case, the identification of the site preceded the Prospectus, which is unusual. Not totally unique, but somewhat unusual.

THE COURT: Was it incorporating into the actual Prospectus process initiated with Congress in 76?

THE WITNESS: Yes. Request from GSA was specific to develop the facility of this, site and further because a Prospectus once approved and funded, an order of Congress to execute the project, it became a binding instruction upon GSA to create the facility on this site.

THE COURT: Go ahead

BY MR. HAMILTON:

Q. Now so there was — may I use the term "mandate" then? Was that your last testimony, create on this site?

A. Once Congress has accepted and funded the proposal that we set forth in a Prospectus, it is mandated to execute that project.

Q. When was this funded?

A. The project — let me start by saying the project was authorized — first authorization was provided in late summer [224] of 1977 both the House and Senate separately authorized the project, and the last of those authorizations came in September of 1977. The funding for the project was authorized in the fiscal year 1978 appropriation, which fiscal year begins October 1st of the calendar, before the fiscal year that began October of 1977. When that appropriation

act was passed, I don't have knowledge of, but our 1978 funding bill provided the funding for this project to begin.

Q. There was a focus in 74, a target in 74, and by 78 a mandate by Congress?

A. By October 1, 1977, we had the instruction to proceed with the project at this location.

Q. From whom?

A. From Congress responding to our proposal.

Q. Now let me just turn you back then again to the Prospectus, Page 4, Paragraph B, Summary Continued, and would you sir by — would you address the need of Customs, sir as outlined in that summary, or just read the language there that specifies the Customs in the paragraph, if you would, Mr. Hood. Page 4, Paragraph B, of the Prospectus.

MR. JOHN: This is to the limiting?

THE COURT: Not for the truth of what Customs did or did not do, or why they did it, but only to show as a predicate for GSA's action for doing what it did.

MR. HAMILTON: Let me say, it speaks to as a [225] public record, the need of Customs, but go ahead Mr. Hood and specify that language as provided in the Prospectus in 1976.

A. Yes. Beginning on the 1974 document reported before Congress in 1976, beginning at 7th Line, I am reading:

"However, all of the locations offered as a result of our efforts to acquire suitable leased space were rejected by the U.S. Custom Service as being too far from the entrance to the bridge which would create significant security problems for the U.S. Customs Service. Customs officials advised us that locating secondary inspection facility beyond eye conduct of the primary inspection area would provide the opportunity for increased smuggling of contraband into the United States which would be operationally inconsistent with their extensive efforts to curb its flow. This is particularly significant in view of the high volume of cargo trucks that enter the United States over the Ambassador Bridge.

As a result, acquisition of suitable leased space is considered infeasible."

Q. Now Mr. Hood, in 1976 then, the language here was instructed to GSA that we had to be —

MR. JOHN: Objection leading.

THE COURT: Sustained. Rephrase.

MR. HAMILTON: What is your understanding of this language in Paragraph B of the Prospectus, if you have an understanding?

[226] THE COURT: From the GSA's Prospectus.

A. We understood from 1973 onward, that Customs really wanted to occupy the Overland Western Terminal and Block as a preferred site. We were reluctant to focus on one particular property because all of our work requires, that we competitively solicit offers from everyone as to what the government wishes to contract for. Sole source acquisition is discouraged and limited to compelling circumstances.

So Customs provided us in November 1974 the document that was referred to before, which set forth the argument of operational and security needs made this the only site that they felt would provide a suitable relocation point for secondary inspection activities. That's in the area of the Bridge Plaza. So we accepted that in 1975 and moved forward with that position.

BY MR. HAMILTON:

Q. And in 1976, the Prospectus was provided and approved in 77?

A. Approved in 1977, and funded by the fall of 1977, fiscal year 1978.

Q. These are all public activities? This is not some secret closed process?

A. No.

Q. Do you have personal knowledge that the Bridge Company [227] was aware of this, all the steps that you were talking about, Mr. Hood?

A. Yes. The Bridge Company became aware of the Prospectus proposal by our action in December of 1975.

THE COURT: How do you know that?

MR. HAMILTON: Stop right there.

BY MR. HAMILTON:

Q. How do you know that?

A. Because my boss' — my boss at that time sent a letter to the president of the Bridge Company, Mr. Roy Lancaster, announcing our intention to develop the facility.

THE COURT: Why, if you know, Mr. Lancaster when they didn't own the company?

THE WITNESS: Excuse me, your Honor. Mr. Conn of GSA sent a letter to Mr. Lancaster who was president of the Bridge Company.

THE COURT: Why would the letter be sent to the Bridge Company? They didn't have any interest in the property at all.

THE WITNESS: Two reasons. Number one, there was a continuing relationship between the Bridge Company and GSA. We were in the relationship of landlord and tenant. They were our landlord. We were their tenants on behalf of Customs.

[228] BY MR. HAMILTON:

Q. Paying a rent to the Bridge Company?

A. At one point in time we were paying rent to the Bridge Company for the facility on the Bridge Plaza.

Q. So the status quo before we relocated the secondary inspection, all the boarder station activities, the Bridge Company was the lessor where the government was the real estate agent —

THE COURT: Excuse me just a moment. I have a matter that I have to handle in the other case.

May I see counsel?

THE COURT: We will go another half hour 40 minutes. We will let you go for the day and handle my other jury, but we will go another half hour, 40 minutes. Okay.

MR. HAMILTON: Okay. You were explaining?

A. I was saying that there were two reasons in response to the Judge's question. Much of our intent of how we wanted to proceed with this project —

BY MR. HAMILTON:

Q. Mr. Hood, let me interrupt you because your intent to how to proceed with the project, are you saying was to acquire Overland?

A. At this point as I understood the Judge's question why would we notify the Bridge Company in December of 1975, we [229] intended to go forward with this project as a government owned facility.

THE COURT: Yes.

THE WITNESS: I was explaining that the two reasons were that because we were in the landlord-tenant relationship that existed for I don't know how many years on the Bridge Plaza. There was a continual exchange of business correspondence, telephone contact and visits between the Bridge Company and General Services Administration, reality specialist assigned to the case and all the managers. So because of the problem of the congestion of the Bridge Plaza and facilities for Customs were a common concern to both of us, we discussed often and at length of what we were each doing.

So the notice in December of 1975 was, if you will, a continuation of that process, but in addition, beginning in 1973, the Bridge Company informed us they were trying to acquire the Overland Western Terminal Property and, I fact, in 1973, they had suffident control of that property to offer it to us for lease, and it was that notice which triggered our second lease solicitation to attempt to acquire the same site by lease in order for us to relocate secondary cargo inspection.

BY MR. HAMILTON:

Q. When was that?

A. 1973 we were notified, and in 1974 —

MR. JOHN: May we approach?

[230] THE COURT: Let's talk about this at sidebar because I am confused.

(Sidebar held off the record.)

BY MR. HAMILTON:

Q. Now Mr. Hood –

THE COURT: Let's wait for all of us to get seated.

MR. HAMILTON: I'm sorry, your Honor.

THE COURT: Go ahead.

MR. HAMILTON: So Mr. Hood, just to recap — or did I interrupt you? You were explaining the dates during — the dates when the Bridge Company was — advised of GSA's intent to acquire this property?

A. Yes, and I am trying to explain the two reasons why. I am still trying to answer the question.

THE COURT: You dealt with the first reason.

The second reason, apparently GSA had been advised that the Bridge Company had some interest, such that in that property, such that you deemed them, you deemed it appropriate to advised the Bridge Company of GSA's plans.

THE WITNESS: Yes, your Honor. In a most compact way, yes.

THE COURT: That's often a good way to answer [231] it.

And what was to your personal knowledge, your understanding of what was the Bridge Company's interest at that time?

THE WITNESS: All I know is what was contained in the letters which they sent to GSA at that time saying that they excepted to acquire the Overland Western Property, such that they offer to us by lease in 1974.

THE COURT: Okay.

BY MR. HAMILTON:

Q. This on-going —

THE COURT: When you say "by lease," what is the use and purpose.

THE WITNESS: For purposes of the relocation of the secondary truck inspection activities.

THE COURT: Customs?

THE WITNESS: Secondary truck inspection activities.

* * * *

APPENDIX J

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA
Plaintiff,

Case Nos. No. 79-78934
96-75494
96-75475
01-70391

CERTAIN LAND SITUATED IN
THE CITY OF DETROIT
WAYNE COUNTY, MICHIGAN, et al.

Volume 3

JURY TRIAL PROCEEDINGS
BEFORE THE HONORABLE GERALD E. ROSEN

United States District Judge
859 US Courthouse & Federal Building
231 Lafayette Boulevard West
Detroit, Michigan
Tuesday, February 12, 2002

APPEARANCES:

RAYMOND HAMILTON, ESQ.,
Assistant United States Attorney
U.S. Department of Justice
P.O. Box 607
Albuquerque, NM 87103
On behalf of the Government.

REPORTED STENOGRAPHICALLY BY:
Carol S. Sapala, RMR-FCRR
Ronald DiBartolomeo, CSR

APPEARANCES (continuing):

MATTHEW S. CLIFFORD, ESQ.,
U.S. Department of Justice
P.O. Box 561 Ben Franklin Station
Washington, D.C. 20044
On behalf of the Government.

CRAIG JOHN, ESQ.,
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On behalf of Defendant Bridge Company.

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[253] Detroit, Michigan
Tuesday February 12, 2002

(Where upon the jury was brought out into the courtroom at 9:45 a.m.)

THE COURT: Counsel satisfied the jurors are in place?

MR. HAMILTON: Yes, Your Honor, it yes, Your Honor.

THE COURT: Okay. Morning, ladies and gentlemen.

Now Mr. John will have the opportunity to cross examine the Government's witness.

Can we have — yes.

Mr. Hood, if you would retake the stand, please.

And, please remember you are still under oath, sir.

THE WITNESS: Yes, Your Honor.

CROSS EXAMINATION

BY MR. JOHN:

Q Good morning, Mr. Hood.

A Good morning.

Q You and I have never had the opportunity to meet before.

A No.

Q I'm Craig John. I'm from Michigan.

And you came in from Chicago for this?

[254] A That is correct.

Q Is that where your office is now?

A No. My office, currently, is the Washington, D.C. but I live in Chicago.

Q Now if I understand correctly, they're various different stages to a condemnation process with GSA; is that right?

A Yes. Yes, sir, I guess.

Q And before there's a Prospectus, there's a stage where you evaluate various different options or alternatives, correct?

A Yes.

Q And I take it there have been times when GSA has evaluated options prior to a Prospectus and then decided not to proceed?

A Yes.

Q And then, eventually, you get to the point where a Prospectus is prepared, is that correct, on some occasions?

A Yes. On some occasions.

Q Have you personally been involved in situations where, in the Prospectus stage, you've looked at various alternatives a project is believed to be necessary, and then the project just never comes to fruition?

A Yes.

Q So now let's go to the Prospectus stage.

[255] You got there — and this is where you prepare a formal document for presentation to Congress?

A Yes.

Q And at that point in time when you prepare the formal document for presentation to Congress, you're asking Congress to provide funding and to determine that it's necessary and proper to move forward with the project?

A And to define the scope of the project.

Q Have you been involved in projects other than this one where a Prospectus was submitted to Congress?

A Yes.

Q Have you ever testified in court before?

A Never in a — in an actual, formal federal court.

I have testified in county courts and before administrative boards, such as the Board of Contract Appeals.

Q This is where there's a dispute between the Government and someone else?

A And a contractor, such as under a construction contract, where there's agreement, generally, about an amount of money being paid for a particular change in the project.

Q How many times do you think you've done that?

A I have testified twice in Board of Contract Appeals matters.

And once at a County Court level on a matter **[256]** unrelated to federal Government work.

Q So once we get to the Prospectus stage, the Congress is asked to provide the mandate for the project; is that correct?

A Yes.

Q Have there ever been situations, in your experience, you, personally, where a Prospectus was presented to Congress and, eventually, it was decided, either by the Government, GSA or by Congress, not to go forward with the project?

A You phrase that have I personally been involved in a situation where a prospectus was presented and then not approved.

I don't think there is any case that I personally have been involved in.

Q But you were there in Chicago with your friends and your co-workers, with your clean desks, and you were aware that there were projects that they didn't get through the Prospectus stage.

Is that correct?

A Well, I'm — I can't recall any that were actually presented to Congress that were not eventually approved.

Q So every time the Government wants it, it gets it?

MR. HAMILTON: Objection, Your Honor.

THE WITNESS: I didn't say that, sir.

[257] THE COURT: Just a moment. Basis?

MR. HAMILTON: Editorial.

THE COURT: Well, I think maybe it had a question mark at the end.

BY MR. JOHN:

Q Is that right?

THE COURT: Can you answer that question.

THE WITNESS: I was interpreting your question as to what I had been involved.

BY MR. JOHN:

Q I'm asking even your friends there at GSA.

A In answer with respect to that, I can't think of any circumstance that they were involved in preparing a Prospectus that was not ultimately approved.

And then you — the last statement you made said that any time GSA or the Government asks for it, Congress approves. And that is not what I said.

Because there may well be situations where Congress would not agree.

Q So there are times when the Government couldn't agree; is that correct?

MR. HAMILTON: Objection. This witness doesn't have knowledge —

THE COURT: Let's see if he does.

MR. HAMILTON: — where Congress might know.

[258] BY MR. JOHN:

Q Let me ask you a different question.

Are you aware of any situation where Congress did not agree?

A I've been thinking about that since you started asking this lining of questioning.

I can't think of any specific project where that has occurred, but it is certainly possible that it would have occurred. The process is open to that.

Q Have you ever heard of —

THE COURT: Let me ask to clarify.

That would be part of the legislative process? For example, a member of Congress from the home district for some reason didn't want to support the project might be able to undermine the project legislatively?

THE WITNESS: Yes. And they're two houses of Congress and, sometimes, the Congressman may feel one way, Senator may feel another.

We propose and they dispose of the question.

BY MR. JOHN:

Q Are you aware of any situation where, once a Prospectus was submitted to Congress, GSA decided not to pursue the Prospectus?

A Yes.

I was involved in one of those.

[259] Q So this is a situation where the project didn't go forward?

A No, I was called before Congress and threatened with contempt of Congress for not trying to go forward with the project.

Q So the project did go forward?

A Oh yes, it did.

THE COURT: I presume from your answer you were not held in contempt of court?

THE WITNESS: No, I was not. I rectified my behavior very quickly.

BY MR. JOHN:

Q Now after Congressional approval is when the funding comes; is that correct?

A Excuse me. I just didn't hear correctly.

Q After Congressional approval is when the funding for project is provided?

A I think you're asking after Prospectus approval funding is provided both are provided by Congress.

Yes. Internal rules of the Congress —

Q You've answered my question yes.

When the Prospectus is approved by Congress, they give you your mandate and your funding, correct?

A It's separate actions through separate committees at separate times.

[260] Q That's the end of the process?

A Most often, it would be the end of the process.

Q And, thereafter, the Government files its condemnation action?

A Well, no. Thereafter —

Q The answer's no. Thank you.

MR. HAMILTON: Your Honor, Your Honor.

MR. JOHN: After that —

THE COURT: Just a moment. Yes.

MR. HAMILTON: I want to let the witness answer without stepping on the witness's answer, Your Honor.

THE COURT: Let's set some grounds rules here, okay. All around.

Counsel, both counsel, will permit witnesses to finish their answer and not interrupt them in mid-sentence, if for no other reason then otherwise you'll drive Ms. Sapala crazy. She won't be able to get a clean transcript.

That's rule number one.

Rule number two, Mr. Hamilton and Mr. John, for that matter, is when making objections you do not have speaking objections. One or two word objections stating the basis for the objection, either in one or two words or citing a Federal Rule of Evidence so that were not coaching the witness, okay?

MR. HAMILTON: Yes, Your Honor.

[261] THE WITNESS: What I was trying to say is that the combination does not, ultimately, become a part of an approved project. We attempt to acquire property voluntary and very often do.

The exception is where condemnation is necessary.

BY MR. JOHN:

Q My question is this.

Eventually, if necessary, the Government files a condemnation action, correct?

A Yes.

Q Are you personally aware of any situation where the Court has said you may not pursue your condemnation action to the Government?

A I'm not personally aware of anywhere we've been told that.

THE COURT: After Congress has already authorized and funded?

THE WITNESS: After the project is lawfully authorized and funded.

BY MR. JOHN:

Q That, I think, is assumed in my question, Mr. Hood. I'm going through the process or attempting to with you.

Now we have looked at, in Government Exhibit 21, this piece of property where you put the number three.

You've been calling that the Overland Tract,

* * * *

[288] Q We'll get a look at that, I think, a little later.

Now you mentioned in your direct examination, that Customs didn't really get interested, formally, until November 1974. Excuse me.

And that sometime earlier, The Bridge Company had advised GSA that The Bridge Company had some sort of a contractual relationship to acquire the Overland Terminal. Right?

A Yes.

In 1973, The Bridge Company had indicated that to —

Q So in 1973, The Bridge Company's telling you they had a contract for the terminal, right?

A I only hesitate to say I don't know if the word "contract" was in what they said. But we interpreted it that way. We understood it to be.

Q Have you seen that contract?

[289] A I, personally, have never seen the contract. I've only seen letters from Mr. Lancaster to —

Q Look at this document, see if you've seen it before.

(After a short delay, the proceedings continued)

A I'm not aware I've ever seen this document before.

Q Do you recognize Mr. Lancaster's signature?

A I do recognize Mr. Lancaster's signature.

Q What's the date of this document?

A It appears to say October 26, 1973.

Q And this is an Offer To Purchase between Overland and The Bridge Company?

MR. HAMILTON: Objection, Your Honor.

THE WITNESS: I did not read the document.

MR. JOHN: Take a look at it.

THE COURT: Well, before we get into the contents of the document, you need to lay a foundation that this witness has personal knowledge about it, I believe.

MR. JOHN: I don't think he does have personal knowledge, but I'm trying to find out if he does.

THE COURT: All right. Let's see if he does.

MR. JOHN: Take a look at the documents.

(After a short delay, the proceedings continued)

THE WITNESS: How much do you want me to read?

[290] BY MR. JOHN:

Q First question I asked you was whether you had seen it before.

I take it from what you read, you're still convinced you haven't seen it before?

A I have not seen this document -- these pieces of paper.

Q I'd like you to take a look at something else; it may refresh your memory as to whether you've seen it before or not.

MR. HAMILTON: Objection, Your Honor. Asked and answered twice.

THE COURT: Overruled.

BY MR. JOHN:

Q Before you start reading it, I'm going to try to set it up for you so maybe you'll remember whether you've seen this or not.

Do you remember that The Bridge Company made — sent a letter to GSA that you testified about yesterday, saying we want to make a deal with you, GSA, concerning the Overland property, because we have it under contract or words to that effect?

Or we have an interest in it or something like that?

A Yes. A letter to that affect, yes.

Q And later on, you found out that there was a [291] contingency in that agreement, right?

A Yes.

We came to understand — I came to understand there was a contingency.

Q And at your deposition, you testified about knowing there was a contingency.

A Much later.

Q Right.

Look at the paragraph there that's under the phrase "contingencies to agreement".

THE COURT: Just a moment, Mr. John. The problem I have is, I've a fairly strict rule in this Court.

I do not allow substantive evidence to be put before the jury. This would be before a foundation is laid sufficient that the exhibit can be admitted.

Now if you tell me that in your proofs, you are able to lay a foundation for the document to be admitted, I'll permit him to do this, subject to your linking it up.

MR. JOHN: Absolutely, I will be able to put it in the proofs.

What I was really trying to do is direct his attention to the portion of the agreement, let him read it to see if that refreshes his recollection.

THE WITNESS: I've never seen this document before.

[292] But you want me to do what?

MR. JOHN: I think its the — well, let me look at the paragraph.

THE COURT: You're showing him this now simply to refresh his memory?

MR. JOHN: If looking at it is going to help him.

THE COURT: Direct his attention.

MR. JOHN: Paragraphs A1 and A2. Read this.

THE COURT: To yourself.

(After a short delay, the proceedings continued)

BY MR. JOHN:

Q Does that help you remember whether you've seen it before, Mr. Hood?

A I've never seen this document before.

* * * *

[293] Q Now Customs started — I'm sorry.

It was in June of 1976 that the Prospectus process with Congress started.

Is my memory about it that correct?

A No. The Prospectus process — in terms of preparation of the Prospectus began in 1975, early 1975. It was submitted to Congress June 4 of 1976.

Q I'm sorry. I thought that's what I asked.

In '76, the Prospectus activity started with Congress in June of '76.

A Okay. With Congress, yes.

Q And in the Fall of 1977, after this letter of August of '77 is when the first house of Congress approved its part of having to approve the Prospectus, right?

A As I recall, they both occurred near the same time.

But in late 1977, the last one being in September of 1977.

[294] Q Both of them after August of 1977?

A I think the first one may have been earlier. But, again, it's in the record and could be checked.

Q Well, take a look at the record.

A I believe my affidavit contains those dates from 1979.

Q So does Exhibit 7, Plaintiff's Exhibit 7, which is already in evidence.

Do we have that, Plaintiff's Exhibit 7? It's in evidence. Should be with the Court or somewhere.

THE COURT: I've got a copy of it. I'm looking at it.

MR. JOHN: The witness's copy. It was admitted into evidence yesterday.

THE WITNESS: I handed it back to someone yesterday.

MR. JOHN: Where is the actual, real copy the Courts are supposed to have? Is this the one?

I want the one the Court is supposed to have.

THE COURT: That's the one I've got, I believe.

MR. JOHN: He had one up there he was testifying from.

THE COURT: You mean the actual filed copy?

MR. JOHN: I want the actual one that — there it is. Okay.

BY MR. JOHN:

[295] Q This is it. Okay. So we can put the dates in the record.

One is July of '77, the House —

A The House in July 1977 and the Senate September 23, 1977.

Q Let's see then.

You got around to filing your condemnation action when?

A Declaration Of Taking, as I recall, was October 11, 1979.

Q After you got the Senate approval on this urgent project?

THE COURT: Why don't you label that.

MR. JOHN: I'm sorry. Thank you.

THE COURT: That Declaration Of Taking.

BY MR. JOHN:

Q How about just taking? Is that okay?

So on this important project two years later after you'd gotten the mandate, you filed the Declaration Of Taking, right?

A Yes.

THE COURT: What happened? Go ahead.

BY MR. JOHN:

Q Then I think you testified yesterday that in late 1982, you finally get onto the property, right?

[296] A Occupy — the Customs occupies the property.

Q You owned the property as of October 11, 1979, right?

A That is correct.

Q You had possession of the property as of late 1979, correct?

A That is correct.

Q And, yesterday, you said this property lay vacant from August of 1977 until October of 1979.

And you were telling The Bridge Company we are taking your property from you.

A Well, let me correct that.

I believe I stated that it was vacant from the point of The Bridge acquired title to which I thought was June or July of 1977, not August of 1977, until — the question was asked two different ways, until 1979 and until we occupied it in 1982.

Q We can look at your transcript, if you'd like to.

But I think what you said was, August of 1977, because they got it on July 31st, 1977?

A Okay.

Q So, yesterday, you said it lay vacant from August of '77 until October of '79, but you were telling The Bridge we're taking that property, right?

A When? October when?

Q From, from June of 1976, until October of 1979, you had [297] been telling The Bridge we are taking that property. Correct?

A Actually, I think since December of 1975. Yes.

Q And after the Government took the property, it took it about three years to do anything with it, didn't it?

A Well, what do you mean by "do anything with it"?

Q In terms of actually using it for secondary inspection.

A Occupying it, yes.

Q And how many four hours of back up occurred at The Bridge from late 1974 until the secondary inspection facility was used by the Government?

MR. HAMILTON: Objection, Your Honor.

THE COURT: Basis?

MR. HAMILTON: 408.

THE COURT: Interesting. Do you mean relevance?

MR. HAMILTON: Relevance, Your Honor.

THE COURT: 402.

MR. HAMILTON: 402.

THE COURT: I'll permit limited questioning in this area. I'm not sure how it's relevant to the issue the jury has to decide, which is valuation. But go ahead. Go ahead.

BY MR. JOHN:

Q How many four hour back ups of traffic occurred between those time frames?

* * * *

[310] THE COURT: Under Rule 106, if Mr. Hamilton requests at this time, contemporaneously, the rest, I'll probably admit the entire exhibit.

MR. HAMILTON: I would make that motion, Your Honor.

THE COURT: Under Rule 106, I would move in the entire exhibit.

BY MR. JOHN:

Q Look at Exhibit U3.

THE COURT: Obviously, you can direct the witness to whatever portions you want to.

MR. JOHN: Thank you, Your Honor.

BY MR. JOHN:

Q Now here's the question again.

Expansion of the — we're talking about prior to condemnation, the expansion of the Bridge Plaza involved using the condemned property as part of contemplated or proposed expansion of The Bridge Plaza. And you said only Parcels One and Two.

Is that what you said, sir?

A Yes, I did.

Q This idea being advanced was about ten months before [311] the condemnation began, at least when you heard about it, right?

A You're referring to the date of the letter being January 4, 1979?

Q When you heard about it, it was about ten months before, right?

A That date is about ten months before the condemnation, nine months before the condemnation.

Q And that plan involved expanding The Plaza across 21st Street, all the way to 20th Street, didn't it?

A Well, I'm rereading it trying to refresh my recollection of Alternate D, as Mr. Kobran referred to it.

Q Look at number two on Page 2 of this letter.

The Bridge Plaza is shown expanded across 21st Street which is vacated for a distance South of Porter, East to 20th Street.

So it's going across 21st Street, 21 street is vacated, for a distance South of Porter, correct? Correct?

A I'm sorry. I was reading and —

Q 21st Street is vacated for a distance South of Porter, correct?

A South of Porter Street, yes.

Q And The Plaza expansion is all the way over to 20th, correct?

A Yes.

[312] Q And it also says:

The secondary inspection is moved somewhat South beyond the Overland Site to allow room for secondary auto inspection.

Correct?

A Yes. It says that.

Q So the Overland Site is moving South, correct?

A That is what this letter says.

Q Of course, the property isn't moving South.

What's going to happen is moving South, right?

A Well —

Q Am I right about that, sir?

A Your — you've read correctly the statements in the letter.

Q And it also says Howard Street.

Down here, that's Howard, right?

A Yes, it is.

Q Is vacated —

A Yes, yes.

Q — between 20th and 21st Street?

THE COURT: Since I don't have this exhibit in front of me, I'm sure the jury doesn't know what it is either.

Could we at least ask the witness to identify what this exhibit is?

[313] MR. JOHN: Sure.

THE WITNESS: This is —

THE COURT: That was a question to the witness.

MR. JOHN: Okay.

THE WITNESS: This letter is a part of the continuing dialogue.

THE COURT: Whose letter is it?

THE WITNESS: This letter is signed by a Michael Kobran K-o-b-r-a-n, who was a traffic engineer with the Detroit Department of Transportation, who was the primary person with whom I corresponded and discussed our plans for the use of this site when we were talking with the City.

THE COURT: This is a letter to him?

THE WITNESS: This is a letter from him to —

MR. JOHN: Go back three pages, you'll find you're on there. The attached list go through pages —

THE WITNESS: It looks like it's to multiple parties. To Attached List.

I see this letter was sent to Mr. Lancaster, a priest at St. Anne's Church who was involved with the Citizens District Council, to a person at the State of Michigan who was involved in the Travel and Commission Center, it was sent to someone at Federal Highway Administration, sent to me and another person at the Michigan Department of Transportation.

[314] THE COURT: So it's a letter.

THE WITNESS: From Mr. Kobran with the City of Detroit. He's a traffic engineer and he is addressing a group of parties.

THE COURT: I see. Okay.

BY MR. JOHN:

Q Dated January 4, 1979?

A January 4, 1979.

Q Ten months before the condemnation begins?

A I think that's nine months.

Q Nine months? Okay.

And in this plan that's being discussed in the letter from the Department of Transportation for the City of Detroit to you, Mr. Lancaster and the others, this fellow was saying one of the plans that is in the hopper, is expand The Plaza Eastward, move the secondary inspection Southward, close Howard Street, take some more property down South of Howard Street, close Howard between 20 and 21st and close 21st Street. Right?

[315] A Is one of the alternatives Mr. Kobran was considering as part of the Detroit Traffic Study in the area.

It represented one of the things he was considering as an option for his traffic study.

Q And it didn't just include Lots One and Two, which is where we began, correct?

A I do not have the drawing attached to this, but my recollection is that the pieces of The Plaza went over Lots One and Two and continued East to the — not taken property over 20th Street.

Q It says move the area of secondary inspection South, doesn't it?

A It does.

I'm not certain what that means, but that's what it says.

Q Certainly implicates Parcel Three, doesn't it?

A It would have an affect upon Parcel Three, this alternate he discussed. I just don't know exactly what it meant.

Q When you received this, you felt the proposed expansion of The Bridge Plaza was something that would modify what the Government wanted to do and require the Government to abandon the project planning you had started, even

though the Government hand yet started the condemnation action yet?

A That's a very long sentence.

Q You felt the proposed expansion of The Plaza would modify what the Government wanted to do, correct?

A Mr. Kobran's alternative was different then what we wanted to do, yes.

Q Modify is the important word here, okay?

Do you agree the proposed expansion of the [316] Bridge Plaza would modify what the Government wanted to do?

A Yes.

I'm really reticent to talk about the proposed expansion of The Bridge plaza, because what I feel is implication of that wording.

Mr. Kobran's Alternative D would require significant modification of what we wanted to do and we did not agree to that.

Q And did you, also, believe, that the proposed expansion of the Bridge Plaza would require the Government to abandon the project planning you had started?

A Yes, it would have disrupted the project planning we had done already.

Again, I have this reservation about expansion of the Bridge Plaza.

Q Let's look at Exhibit U5.

THE COURT: Tell you what. Before we do that Mr. John, I'm going to give the jury a break.

Ladies and gentlemen of the jury, we'll break for the morning. Have a morning break, rather, and resume about 15 minutes, okay? Then we'll go until about quarter of one or 1:00 okay? See how we're doing at that time in terms of witnesses.

Don't discuss the case, don't let anyone discuss the case with you. Keep an open mind. Leave your notebooks [317] on your chairs upside down.

(Whereupon court was in recess at 11:10 a.m.)

* * * *

[334] Q. So in 1975, and 76, and 77 when the Prospectus is developed and presented to Congress, you all knew that you were not going to be able to handle the peak volume?

A. We did not built to peak. We built to less than peak.

Q. And the bridge was to worry about the traffic backup?

A. No, it is a prudent —

THE COURT: Why is that?

THE WITNESS: Because the amount of investment to design to peak is very high, and much of that investment lies unused, anything other than the peak time. So it's a trade off between how much money is worth to do the idea as oppose to the more practical.

THE COURT: There is a cost benefit?

THE WITNESS: Cost benefit judgment, and I refer [335] to the 85 percentile, another contemporaneous standard that we use. No, it is not exactly 85 percentile use in this project.

BY MR. JOHN:

Q. Your studies is about 80 percent of the trucks crossing the bridge coming in the U.S. had to go through secondary inspection?

A. That's what Customs was telling us, yes. As the project started, the number declined as the project went forward.

Q. Because they started to take more time in the primary inspection facility. They didn't have to send people to secondary?

A. Rely more on bonding, on the handling process of duties, and —

Q. Am I right, they began to spend more time in primary?

A. You are right about that.

Q. When you take more time at primary, which is here, people wait in line, right? Am I right? They wait in line?

A. Not necessarily. This is a design matter that was dealt with by converting when the Plaza was reconstructed, all of the Customs and occupied booths capable of taking trucks at that time. Only two of the seven lanes had clearance of height for trucks. It was possible to take trucks. I still think about seven lanes when rebuilt.

Q. Eighty percent of the trucks going through secondary [336] inspection. There's some trucks back here waiting in line who don't have to go through secondary inspection?

MR. HAMILTON: Objection. What's the relevance?

THE COURT: It is all part of the same. I will permit this.

MR. JOHN: Correct.

A. Yes.

BY MR. JOHN:

Q. And there are cars back here. It goes all the way across the bridge who don't have to wait, right?

A. Well, they have to wait because the traffic is not moving. They are not obligated to wait. They are held up by what's happening up ahead.

Q. Sure. And for the secondary truck inspection, each took about 20 minutes?

A. That was an estimate Customs gave us that we used for our analysis.

Q. Would you agree the peak volume is between 8 a.m. and 4 p.m.?

A. In the three shifts each day, that was a higher shift.

Q. That was peak volume, wasn't it?

A. Peak was a reference to a moment in time, not an entire every day occurrence. From 8 to 4.

Q. So you are saying no, the government's position was that [337] peak volume was between 8 and 4, 8 a.m. and 4 p.m. Is that what you are telling me?

A. Well, it probably would be a lot more helpful if I recite what the analysis actually read, but that was the shift or time of day when traffic was heavier than the second shift or third shift. It is more Monday through Friday than Saturday and Sunday.

Q. Fifty percent of that traffic was in that time frame?

A. I think the percentage could be that. It is in the documents.

Q. And how many bays, docks were there over here?

A. I believe 42.

Q. And peak volume required 50?

A. That is correct.

Q. With a holding area of how many trucks for parking?

A. I don't remember the number.

Q. But more than just 50 trucks. You had 50 bays, but a holding area, right?

A. I don't recall it was that way. My recollection is that the calculations were that to have 50 trucks to cope with at the peak moments, and we had 42 bays. If different from that it is in the documents.

Q. Was it your judgment that by 1979, the traffic situation was unbearable?

A. Before 1979 the traffic situation was unbearable for [338] anyone stuck in it, yes.

Q. Look at Plaintiff's Exhibit Number 7, which should be in the book up there, your Prospectus?

A. Okay.

Q. Do you have a plaintiff's book up there?

A. You handed it to me earlier?

Q. Yes.

A. Excuse me. Look at the Prospectus?

Q. Page 2 of the Prospectus.

A. Yes.

Q. In particular just let your eyes scan down to —

A. Traffic delays in excess of four hours.

Q. Frequently?

A. Frequently.

* * * *

APPENDIX K

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,
Plaintiff,

v. CIVIL ACTION
NO. 79-73934

CERTAIN LAND SITUATED IN THE CITY OF DETROIT, COUNTY OF WAYNE, STATE OF MICHIGAN, et al ,
Defendants.

JURY TRIAL - VOLUME 5
BEFORE THE HONORABLE GERALD E. ROSEN
United States District Judge
832 Theodore Levin U.S. Courthouse
231 Lafayette Boulevard West
Detroit, Michigan
February 15, 2002

APPEARANCES:

MR. RAYMOND HAMILTON, ESQ.,
MR. MATTHEW S. CLIFFORD, ESQ.,
In behalf of Plaintiff.
MR. CRAIG L. JOHN, ESQ.,
In behalf of Defendant.

Suzanne Jacques, CSR, RMR
Official Court Reporter - U.S. District Court
(313) 234-5155

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EXHIBITS

Exhibit No.	Offered	Received

[653]

Detroit, Michigan
February 15, 2002
9:28 a.m.

THE COURT: We'll bring the jury right in.

(Jury in 9:28 a.m.)

THE COURT: Counsel satisfied the jurors are in place?

MR. HAMILTON: Yes, Your Honor.

MR. JOHN: Yes, Your Honor.

THE COURT: Court is in session. You may be seated.

Mr. Stamper, would you resume the stand, please? And remember you are still under oath, sir.

THE WITNESS: Yes, sir.

MR. JOHN: May I move the lectern, Your Honor?

THE COURT: Yes.

CONTINUED DIRECT EXAMINATION

* * * *

[654] BY MR. JOHN:

Q. Page 45, Line 9. Are you there?

A. Yes, sir.

Q. And the Bridge Company first became interested in Parcel C in 1971 I believe you said?

A. I believe about 1971.

Q. Were negotiations commenced with Overland Express around that time?

A. I believe there were discussions about it, I believe there were.

Q. And what was the outcome of those discussions?

A. I believe — now, I want to be sure of my times, and I'm not sure of my timing. I believe at the time that they were considering expansion, and certainly if they were able to expand then we would be given first opportunity to negotiate the purchase of their property.

[672] Q. Page 46, Mr. Stamper, the last question on that page. Are you there?

A. Yes, sir.

Q. Was Overland looking for another area in which to replace this Parcel C that you were interested in?

A. They were looking for larger facilities.

Q. Page 47, Mr. Stamper, Line 13. Now, did there come a time when you actually got down to seriously discussing price with Overland?

A. Yes.

Q. Were you involved in those negotiations?

A. Yes.

Q. And who mainly did you talk to from Overland?

A. Well, there were a couple of others involved as I remember. Do you want their names?

Q. Yes.

A. One was McGuire, and I believe the other was White.

Q. If you go to Page 48, Line 3. Are you there, Mr. Stamper?

A. Yes.

Q. Well, now, as I understand it, the Bridge Company eventually purchased Parcel C for a million two hundred thousand, is that correct?

A. Yes, that's correct.

Q. And how did you arrive at that figure?

[673] A. By a price set by Overland, and an offer being made and a compromise.

Q. Do you recall what Overland's price was initially?

A. I believe it was a million five.

Q. Go to page 49, the first question on the page. Question, was there ever any discussion about the price being gauged upon Overland's cost of obtaining a suitable replacement, land replacement facility?

A. Only to the extent that their, I believe their costs for acquisition of the property they were interested in, because of the time period, had increased due to inflation, and so on.

* * * *

[757] THE COURT: Folks, we've been taking a rather arcane journey through the rules of evidence on some very difficult and challenging points. After reviewing law and after reviewing the evidence which Mr. John now wants to offer, I'm going to give you a limiting instruction. Remember we've talked about limiting instructions, and that is, these statements which Mr. John wants to offer are statements in an affidavit of Mr. Lancaster, okay. However, you cannot consider them for the truth.

Well, let me first say this. They were offered in his representative capacity as the president at the time [758] of the Bridge Company, okay. Now, you cannot consider them for

the truth. You may consider them as to how they may reflect on the credibility of the testimony from Mr. Lancaster that you have heard which was offered for the truth, okay? Go ahead.

MR. JOHN: And I'll just read from an affidavit dated March 22, 1982 by Mr. Lancaster.

Paragraph 1, I am the president of the Detroit International Bridge Company, a defendant in this action.

Paragraph 9, beginning in October, 1966, DIBCO began its plans to renovate, replace and expand the original facilities constructed in 1929 on both the Detroit and Windsor plazas of the Ambassador Bridge.

Paragraph 15, DIBCO developed a phased expansion plan for the Detroit plaza. The initial phases involve the use of Parcel 1, the four corner lots, and Parcel 3, Overland Western parcel.

Paragraph 16, in February 1967, the plans for the expanded and renovated Detroit plaza were sent to the General Services Administration, GSA.

Paragraph 18, U.S. Customs personnel had and continued to encourage DIBCO to purge Overland Western's property. In 1973, they requested DIBCO to buy the property and stated that they would move to the property once it was owned by DIBCO.

[759] Paragraph 19, in October 1973, DIBCO made Overland Western an offer to purchase Parcel 3 and 2 of the four parcels included within Parcel 1, and negotiated an agreement for the purchase of those properties. The agreement was conditioned on Overland Western's ability to purchase an alternate site for its business for the City of Detroit.

Paragraph 20, DIBCO informed GSA, U.S. Customs and U.S. Immigration in person at a meeting in Chicago in November 1973, and also thereafter in writing, of its agreement in writing with Overland Western.

Paragraph 27 — I'm sorry, 26, during late 1975 and early 1976, Overland Western continued to negotiate with

the City of Detroit for an alternate site, and kept DIBCO informed of its negotiations for the alternate site.

Paragraph 27, in the fall of 1976, Overland Western was able to purchase an alternate site from the City of Detroit, and started construction of the new facility on that alternate site which was not scheduled for completion until the summer of 1977.

Paragraph 28, upon being informed that Overland Western and the City of Detroit were about to reach an agreement, DIBCO in the summer of 1976 resumed negotiations with Overland Western for the purchase of Parcel 3. These negotiations resulted in an agreement in principle for [760] DIBCO to purchase Parcel 3 as well as the two lots near the corner of 21st and Porter Streets which comprise one half of Parcel 1.

The purchase price — 29, the purchase price agreed upon by the parties was $1.2 million. A formal agreement was entered into between the parties on November 30, 1976. Under the terms of the agreement, DIBCO would obtain possession of the property on July 1, 1977.

Paragraph 30, with the purchase of the Overland Western properties, DIBCO had acquired sufficient land to the east of the then Detroit plaza for it to implement the initial phase of the proposed plaza expansion. Parcel two, the Sagoian lot, was not necessary for implementation of the initial phase of the DIBCO Detroit plaza expansions.

Paragraph 31, upon the execution of the formal purchase agreement, DIBCO, on December 17, 1976, informed GSA and Customs that it had acquired the Overland site and was prepared to negotiate a lease for the Overland Western facilities to GSA for the use of U.S. Customs.

Paragraph 32, upon being informed by DIBCO of the acquisition of the Overland Western properties and of DIBCO's intent to negotiate a lease with GSA, GSA responded that it had no interest in negotiating a lease, and that its, quote, initial reaction was not to change our course of action, close quote.

[761] Paragraph 33, until then, DIBCO had not been informed by either GSA or U.S. Customs that a prospectus had been filed with the congress whereby GSA would purchase the Overland Western parcel. DIBCO became aware that a prospectus had been filed through correspondence with officials of the Greater Detroit Chamber of Commerce. The information DIBCO received did not inform DIBCO that the GSA would proceed to condemn the property and did not inform DIBCO that GSA would refuse to lease the property, and DIBCO at the time of acquisition of the Overland properties was not aware of either fact.

34, DIBCO was not notified by any governmental agency of the congressional hearings on the prospectus regarding the purchase of the Overland Western properties by GSA, nor given an opportunity to timely inform the congress that the parcels were available to U.S. Customs for lease.

Paragraph 35 — I'm sorry — Paragraph 36, it was not contemplated by DIBCO that the needs of U.S. Customs required the lease and use of the entire Parcel 3, nor was it ever contemplated to lease to GSA anything other than office space, inspection areas and employee parking.

Paragraph 52, DIBCO has never contemplated use of Parcel 3 as a, quote, truck terminal.

Paragraph 53, at a meeting at GSA in Chicago on [762] May 9, 1979, DIBCO again offered to U.S. Customs and GSA the free use of certain portions of Parcel 3.

Paragraph 54, the free use proposal made again to GSA and U.S. Customs in May 1979 was designed, as in the past, to induce immediate efficient use of Parcel 3, relieve congestion and waiting time on the Detroit plaza, permit implementation of the initial phase of the Detroit plaza renovation and expansion program, and implement U.S. Customs stated preference.

55, it was not the intention of DIBCO to obtain the consent of GSA or U.S. Customs for DIBCO to begin using its own property. It was the intent of DIBCO to include the

cooperation of GSA and U.S. Customs in the speedy development of final plans for the renovation of the Detroit plaza.

56, the determination that, quote, the best solution to be relocating U.S. Customs secondary inspection from the apron of the bridge to some facility within reasonable proximity came as a result of efforts initiated by DIBCO as far back as 1969.

Paragraph 57, DIBCO believes that the decision to proceed with the condemnation of Parcel 3 was made by GSA after it became aware to GSA that DIBCO would be commercially exploiting the property by making available the services desired by the trucking company users of the [763] Ambassador Bridge.

And two last ones. 59, for all — for reasons unknown to DIBCO, GSA has constantly interfered with all of DIBCO's efforts to expand and renovate its Detroit plaza and has persistently refused to confer, request, coordinate or cooperate in the expansion of the plaza which, among other things, has always been designed to accommodate the needs of Customs, Immigration and DIBCO.

And finally, Paragraph 60, possession of Parcels 1 and 3 was turned over to GSA on January 23, 1980, and DIBCO paid to that date all expenses associated with ownership including taxes, insurance, maintenance and security services.

No further questions of Mr. Stamper, Your Honor.

* * * *

[768] (Jury in 2:10 p.m.)

THE COURT: Counsel satisfied the jurors are in place?

MR. HAMILTON: Yes, Your Honor.

MR. JOHN: Yes, Your Honor.

WILLIAM P. WALSH,

hereinbefore called as a witness, being first duly sworn by the Court to tell the truth, the whole truth, and nothing but the truth, was examined and testified upon his oath as follows:

MR. JOHN: Has the witness given his name to the reporter yet?

THE COURT: If you could, give and spell your full name.

THE WITNESS: William P. Walsh, W-a-l-s-h.

(2:11 p.m.)

DIRECT EXAMINATION

BY MR. JOHN:

Q. Where do you live, Mr. Walsh?

A. At 819 Willow Estates Drive, Bloomfield Hills, Michigan, 48202.

Q. And what is your age?

A. 72.

Q. Do you have any children?

[769] A. I have four daughters.

* * * *

A. He had a few land sales, but I don't recall whether he had more than one actual truck terminal.

Q. Now, you say you would ordinarily go to comparable sales. Did you go to comparable sales in this situation?

A. I did not go to directly comparable sales because I couldn't find any directly comparable sales.

Q. What were you looking for in terms of a comparable sale?

A. What I was looking for was a sale of the property adjacent to a bridge that could be used as an expansion or for additional flexibility, or whatever, adjacent to the bridge. I didn't find any, didn't find any sales of bridges or I didn't find any sales of comparable properties directly related to that.

Q. Why were you interested in comparables next to a bridge that could be used for expansion?

A. Because that was the highest and best use of the subject property.

Q. And how did you come to the conclusion that the highest and best use of the subject property is as an expansion area for the bridge?

A. By looking at the history of the bridge and looking at the backup of the trucks, the capacity, the functional incapacity, inability of the bridge itself to carry the traffic that it was designed to carry, and would carry very easily were it not for problems at the plaza area, and so the highest and best use, this piece, is also fit perfectly as a source, a resource for modifying the bridge, for expanding the plaza, and so I felt that it was critical to the expansion of the bridge, and therefore its highest and best use was as it related to its adjacent properties.

Q. Was there anything about the bridge that provided flexibility or future growth or anything of that nature that led you to the conclusion its highest and best use would be as part of the bridge?

A. Yes, the highest and best use is directly related to the capacity to change the plaza, to be flexible in the future to change the plaza again, to expand to other sites. It more or less led the way to future development going south, and so it was important to have, use that property for its expansion capabilities.

Q. Why is flexibility for a property like the Ambassador **[791]** Bridge important?

A. Well, flexibility is very important because you've got a very long-life bridge, you've got several factors which can change. You might want to modify the entire plaza, you might want to modify areas of it. There's all kinds of things.

As a matter of fact, just since 9/11, you have a situation at the bridge where they're inspecting the trucks after they come over the bridge, which they always did, because that was the time when they would find out if they had contraband on or weren't paying proper duty, and so forth. It's

only necessary to find out what they were doing with respect to what their cargos were.

Now, with the danger of someone going on the bridge and trying to blow up the bridge by firing a bomb off at the top of the bridge, it may be necessary to switch the plazas and do the inspection on the Canadian side for trucks coming to the United States, and the American side for trucks going into Canada. If they had to do that, you'd have to rearrange your entire plaza area, and that, that is a very difficult thing to do, and it would require that you do it in a manner which coordinates all of the factors that go into the plaza. And so owning that additional land would be very valuable to making those modifications.

[792] Q. Even so, why can't you just use sales of comparable property?

A. The problem is you can use sales of comparable property which are comparable in so far as their market position is concerned, but not directly comparable in so far as they could use them for the same purpose.

Q. This would have something to do with there aren't sales of property —

MR. HAMILTON: Your Honor, this has been leading here for awhile I think.

THE COURT: Well, he's an expert, and he, under 703, can give him data upon which an expert would rely which I think is what he's doing here, at least posing the question that way. Go ahead.

BY MR. JOHN:

Q. There are not, to your knowledge, sales of property next to bridges, is that where you are?

A. No, I didn't find any sales of property next to bridges. What I did find was sales of property next to other facilities which are required, in other words, expansion or flexibility of properties, which gave expansion or flexibility, or cured a problem by being available to an adjacent user, major adjacent user. So they would buy that piece of property and either acquire flexibility or immediate expansion or cure a

situation, or [793] the last sale in a major assembly. I looked at those to get an idea of how the market operated and what the levels of purchase prices were.

Q. This is by analogy we're going to do this?

A. Yes.

Q. We'll get to that in a moment. Let's go in a different direction just for a couple questions.

Now, the property that is at issue here, Parcels 3 and 1, were functioning as a truck terminal for many years. Why would the bridge not simply keep using it as a truck terminal based upon your understanding of the market situation?

A. Because they needed land to expand the plaza to do other factors relative to the appropriate use of the overall bridge, and the truck terminal was simply not a, did not reflect the highest and best use. It would not sell at its highest amount for that use. To bring the highest price in terms of money, it would have to sell to the bridge as, in its capacity for expansion.

THE COURT: Let me ask you a question, and maybe this is where Mr. John is going. One of the criteria you indicated that would be necessary in determining highest and best use was that there not be any legal obstacles to that use.

THE WITNESS: That's correct, Your Honor.

[794] THE COURT: Obviously, if there were legal obstacles to the use, you would have to look at other uses; in other words, other uses would become then the highest and best use.

THE WITNESS: That's correct, Your Honor.

BY MR. JOHN:

Q. How can you determine what a willing buyer and a willing seller will choose for a price when you don't have other sales that are similar to rely upon?

A. Well, what I found was sales which were similar in so far as they expressed a capacity to expansion or to acquire flexibility or to cure a situation within with an adjacent

property through the situation where the property under appraisal fits like a piece in a jigsaw puzzle or maybe the last piece in a jigsaw puzzle to the adjacent owner, so that it's property which blends itself, it lends itself, rather, to use by an adjacent owner for maximum productivity of both the subject property and the adjacent property, or a combination.

Q. What kinds of things would that mean? In what sorts of situations are you talking about?

A. Well, to begin with, I found three sales of property which were simply for comparable. These sales were sold to enable the owner to have land which in the future he — he would be able to expand his facility or create whatever [795] type of additional use he had, and they would include such things as Edison. Detroit Edison bought a facility on Grand River Avenue to expand its capacity. It didn't necessarily have any specific use for it at the time, but they wanted it to acquire all of the property in the area, and they had acquired most of it, so it's just an additional add on, but it didn't have a specific use at the time.

Myself, my partner and myself purchased a property on Woodward next to the old Royal Oak corridor because it had a small office building. We purchased it for land value because we knew that the owner was going to be assembling property. There was only so much property left on Woodward Avenue, so we bought it, held it for a couple years and made a very, very nice profit because we knew it was going to be marketable to the adjacent owner.

The Abraham family, who owned most of the parking lots downtown, sold several parcels to the Ilitch family, from over Grand River behind the Fox Theatre, because of the heavy investment that the Ilitch family had in the stadium and the Fox, and all the rest of the stuff, so they needed land to control. It gave them the flexibility for future developments in the area. That's one phase, one type of comparable.

The second type of comparable would be where [796] there's an immediate expansion. That would include such things as the — oh, Art Van store on Woodward Avenue.

They acquired adjacent land just to the south of them and built a major facility combined with the existing facility. They put another facility.

The opera house had to have land to expand the opera house, and actually the piece they bought became the land on which — or the land under the stage. That was needed for expansion.

And the — there's a Walker Brothers catering on Woodward just north of the Fisher Freeway, few blocks north of Fisher Freeway. They wanted land for expansion. They acquired a piece next door. So that this was the expansion situation.

Then, the next group of sales that I found were sales that were necessary to cure a defect, where you got a problem, you've got an imbalance of one use versus the other.

So the City of Detroit on Congress purchased a very large site to build a parking deck for Cobo Hall because Cobo Hall, when they expanded Cobo Hall, it went out of balance with parking, so they did that. Blue Cross/Blue Shield needed more parking; they purchased a site. And the Sterling Group bought an office building and realized they didn't have enough parking, and they **[797]** purchased a parking lot.

Then, finally, the fourth group is the final, purchase for a major assembly, and the Greektown Casino, they had everything but the land that they needed for the front entrance, so they acquired that land, paid a very big price for it, but it completed their assembly, and the Motor City, Motor City had acquired all of their land except for they needed — they acquired 14 acres. They needed another acre and a half, and they paid — per square foot rate, they paid about eight times more for the remaining land than they paid for the — they paid about 15 times, 15 times more for the adjacent land than they paid for the big site.

This is what we're able to find to indicate the overall area of value for the subject.

Q. Now, you've been talking about these four different phenomena. Is this something that just started happening recently in your experience, or is it something that's been there forever, or what?

A. No, this has been going on. This has been going on for almost as long as anybody can remember, that people would buy sites to complete another site, or to do the kinds of things they wanted to do with their property. They had to acquire some extra land, they'd acquire it. And normally, when you acquire extra land for a specific [798] purpose, there is a premium attached.

Q. Is this a situation where the seller always realizes what they've got?

A. No, it isn't. Sometimes you're able to buy it without the premium, as a matter of fact. When both buyer and seller know that there is a special need, the premium is charged and paid.

Q. Okay. Were you aware of the circumstances surrounding the sale of the Overland site to the bridge company in 1976?

A. Yes.

Q. Did you inquire about that sale to see whether it could perform — could form a basis for a comparable?

A. I did.

Q. And could it?

A. No.

Q. Why not?

A. Because it was a transaction that took place over several years of time, and it reflected a desire on the part of the seller simply to find a replacement facility, and it didn't meet the fully formed, or at least fully motivated buyer and seller in my opinion.

Q. Have you determined a value as of October 29 — I'm sorry, October 11, 1979 for Parcels 3 and 1?

A. Yes, I have.

[799] Q. What value would you place on Parcels 3 and 1 using the approach you've just described?

A. $8,150,000.

Q. And how did you arrive at that?

A. I arrived at that by analysis of the sales that I've just previously described, and in my opinion, both from the sales I talked about and from experience over the past 50 years, my opinion is that that period of time, for the control and flexibility, you pay around about $25 a square foot, that this is more than control or flexibility, this was to cure a situation, and in my opinion it went to $50 per square foot for the cure of this situation plus maintaining the control and flexibility. So it went to $50 a square foot. $50 a square foot times 163,197 square feet equals, rounded, $8,150,000.

Q. So you arrived at $8,150,000?

A. That's correct.

Q. Using $50 per square foot.

A. Correct.

THE COURT: When you talk about comparable sales, these are the four sales for, as you put them, situations where there was an acquisition of property necessary to facilitate an expansion.

THE WITNESS: That's correct, Your Honor.

THE COURT: Wouldn't one of the most important [800] underlying factors in that be the location and the market value in those locales of that expansion property?

THE WITNESS: Actually, you would think so.

THE COURT: I mean, you talked about the Fox Theatre, for example.

THE WITNESS: The Fox Theatre, that property was in a depressed location, coming over to Grand River. The property was not even parking lots, it was grass, and that close to downtown you got grass, you got a serious problem, I mean, in so far as economics are concerned.

But other properties, like on north Woodward, the numbers came the same regardless of whether they were in

proximity to downtown or out in the suburban areas, where you do get a difference is if you have like the casinos, that use is so overwhelming that the price is higher than any other —

THE COURT: So if I understand your methodology in arriving at the price, the primary criteria driving this price is the need of the party doing the expanding for that property.

THE WITNESS: That is, there's two criteria. The primary is the need of the party doing the expanding, or the desire of the party doing the expanding, and the capacity of the site itself to fit that need.

THE COURT: So, in other words if these parcels [801] which we've been referring to as the Overland parcels had been available for the — to relieve the overflow or the congestion on the bridge, if they had been available, the value of that property would have been $50 a square foot to the owner of the property at the time of the taking.

THE WITNESS: That's correct, Your Honor.

BY MR. JOHN:

Q. One last question. Even if this phenomenon you've talked about is generally true, why not $30, $20, $70 a square foot. Why 50?

A. Well, I looked at it, the information I had indicated that for the 1979 period, that the value, at about $25 a square foot, would be the same price that people were paying to get control and for flexibility. Now, to go — to cure a situation, or for expansion, rather, for just plain expansion, we have about $35 to $50. For cures, it went from about $50 to $60. So my opinion was that it was flexibility and control and a measure of expansion, and also had a measure of cure. So I felt that, rather than $25, which is the flexibility and control, I felt that the $50 number was the most reasonable basis for value of this property.

Q. And there were some as high as 60, in your judgment?

A. Yes.

MR. JOHN: No further questions, Your Honor.

[802] (3:02 p.m.)

CROSS EXAMINATION

BY MR HAMILTON:

Q. Mr. Walsh, you were contacted in, what, 1985 to do this analysis?

A. No, I think it was late '82 or '83, and I did the report I think in '84, maybe '85, and then I — I think I was — had to be — I was deposed in '83 and '85. It was summer.

Q. Mr. Walsh, you haven't been here for the past couple of days at trial, have you, sir?

A. No, I haven't.

Q. Mr. Walsh, you are assuming that this property was purchased for expansion. You haven't heard the testimony that the property was purchased for Customs, have you? You haven't heard that testimony, have you, sir?

A. I heard this morning that it was purchased for expansion and that they had offered it to Customs as a, for Customs' use.

Q. So you have heard the testimony that the property, rather than being purchased for cure or for closure, or whatever, this — you have heard this testimony, at least

* * * *

THE COURT: The problem is I'm concerned about [847] the time that we have.

MR. JOHN: I understand and appreciate that. I'm just concerned about the retrial issues if we have to do it.

THE COURT: As much as I don't want to retry this case, I just simply do not see the law, how it applies to the state of the evidence as it is, supports anything that would approximate any of the theories that you're propounding for this. Now, you've put in as an offer of proof, you've put in Mr. Vanderveen, right?

MR. JOHN: He's in the 11 to $16 million range, but probably higher.

THE COURT: And that's as the revenue flow?

MR. JOHN: That is — that would be an income analysis to valuation.

THE COURT: All right. I think I'm giving you an awful lot of latitude letting your witness, your expert, rather, go out, essentially do further research and investigation in the middle of trial, but given where we're at in the proofs and the way this thing has developed, piecemeal, and in part as I know it, I view it, at least in part, the government's fault because the government should

* * * *

APPENDIX L

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA
Plaintiff,

Case Nos. No. 79-78934
96-75494
96-75475
01-70391

CERTAIN LAND SITUATED IN
THE CITY OF DETROIT
WAYNE COUNTY, MICHIGAN, et al.

Volume 6

JURY TRIAL PROCEEDINGS
BEFORE THE HONORABLE GERALD E. ROSEN
United States District Judge
859 US Courthouse & Federal Building
231 Lafayette Boulevard West
Detroit, Michigan
Tuesday, February 19, 2002

APPEARANCES:

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[862] EXHIBITS

IDENTIFICATION	MARKED	RECEIVED
Plaintiffs Exhibit Number 16		946

[863] Detroit, Michigan
Tuesday February 19, 2002
10:43 a.m.

(The jury was brought out into the courtroom)

THE COURT: Counsel satisfied the jurors are in place?

MR. JOHN: Yes, Your Honor.

MR. HAMILTON: Yes, Your Honor.

THE COURT: Mr. Walsh, would you resume the stand, please.

Sir, please remember that you are under oath.

REDIRECT EXAMINATION

BY MR. JOHN:

Q Morning, Mr. Walsh.

A Morning.

Q When we were here last week, we discussed your opinion about the value of the two parcels of property involved in this case.

I want to follow up in an area Judge Rosen focused upon with you.

For purposes of this testimony, I'd like to you assume that the use will not involve resuming United States Customs from the U.S. Plaza.

* * * *

[876] MR. JOHN: I've no further questions, Your Honor.

THE COURT: Mr. Hamilton, cross examination?

RECROSS EXAMINATION

BY MR. HAMILTON:

Q Now just to be clear, Mr. Walsh, these values you're giving today, are taken from the sales we discussed last week, correct?

A That's correct.

Q So those 1996, 1995, 1997, 1999, 1995, 1994 sales, those are the sales we're talking about which you drew from, correct?

A That's correct, yes.

Q Also, the 1997 sales?

A That's correct.

Q Okay. And so we talked about the 20 year dates and we talked about the size of these parcels.

For example, we talked about the J Max sale which was only 5000 square feet; we talked about that?

A Yes.

Q We talked about the fact you're using a 5000 square foot sale to — in 1995, to come up with a value of $147,000 track in 1979, correct?

A One of the sales, yes.

Q All right. Now let's talk about — we talked about proximity date wise.

[877] And we talked about comparability or lack of comparability size wise. Let's talk about the third criteria which is location wise.

Where are these scattered parcels on Cass, Grand River, Columbia, Elizabeth, Detroit and Michigan?

Where are they?

A They're on the outer limits of the downtown area.

Q How far away from the subject track?

A Couple miles.

Q All right.

So we got at least a couple miles distance in terms of that correct, Mr. Walsh?

A Yes.

Q I'm going to turn to you — I want to discuss with you the assumptions here that you're making so I can understand you.

First of all, you're throwing two numbers at the jury and they're going to — they're supposed to pick one of those two numbers, right?

A I think so, yes.

Q They can either pick the 8 million or the six mill; that's their choice, right?

THE COURT: I'm sorry, Mr. Hamilton.

MR. HAMILTON: I'm sorry.

THE COURT: I want to give the jury a limiting [878] instruction here.

Ladies and gentlemen, you heard testimony on Friday from Mr. Walsh in which he indicated that the value of the property that has been taken by the Government was at $50 per square feet — $50 per square foot, when valued in conjunction with the bridge as part of a use on the bridge.

I have ruled that that is not compensable. That that is not a compensable use.

In other words, you may not take into consideration the value of the property when it is used in conjunction with the bridge or together with the bridge itself. That is known as a special use or a peculiar use to the owner of the bridge property at the time. That is not compensable.

However, I have also ruled that you may consider the property as being valued because of its location approximate to the bridge or near the bridge.

In other words, you may take into account its location as being near the bridge in arriving at what its highest and best use is. I will give you an instruction on that.

But I am now instructing you that the testimony Mr. Walsh gave you on Friday concerning the use of the property, the $8 million figure, when it is used in conjunction with the bridge, must be disregarded, cannot be considered by you, okay?

[879] BY MR. HAMILTON:

Q Mr. Walsh, I'm trying to understand, first of all, there are two values per property that you have given today?

A Yes.

Q All right. There's a $25 a square foot value and $37 square foot value for each parcel?

A Correct.

Q The jury, you're just saying you guys pick one of the two, correct?

A Well, I believe that if I we're going to pick one, I would pick the $37.50.

Q The higher number?

A Because of the capacity.

Q I'm asking you — your choice — the jury's is, they pick one of the two; is that correct?

I didn't ask you yours for them; they pick one of the two.

A Yes, that would be it.

Q Now let's talk about number two, which is, move all the buildings on the plaza onto Parcel Three?

A Move a number of buildings from Parcel Two to Parcel Three.

Q Leave customs there?

A Leave customs there.

Q Leave customs on The Plaza?

* * * *

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No. 06-639

In the Supreme Court of the United States

DETROIT INTERNATIONAL BRIDGE COMPANY,
PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court used an unconstitutionally low rate of interest in determining the amount of just compensation owed to petitioner after condemnation of its property.

2. Whether the district court erred in excluding evidence concerning the value that the condemned property might have had if used in combination with neighboring tracts.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is reported at 450 F.3d 205. The opinions of the district court (Pet. App. 17a-27a, 29a-52a) are reported at 286 F. Supp. 2d 865 and 188 F. Supp. 2d 747.

JURISDICTION

The judgment of the court of appeals was entered on June 8, 2006. On August 31, 2006, Justice Stevens extended the time within which to file a petition for a writ of certiorari to and including November 5, 2006, and the petition was filed on November 3, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Fifth Amendment to the United States Constitution states that private property shall not be taken for public use "without just compensation." The usual measure of just compensation is the "fair market value" of the property at the time of the taking. See, *e.g.*, *United States* v. *50 Acres of Land*, 469 U.S. 24, 29 (1984). The Declaration of Taking Act (DTA), 40 U.S.C. 3114-3118 (Supp. III 2003), authorizes the federal government to acquire ownership and take possession of condemned property by filing a declaration of taking and paying into the court an amount equal to an estimate of just compensation. 40 U.S.C. 3114(a) (Supp. III 2003). The precise amount of just compensation owed to the property owner is determined in a later judicial proceeding. 40 U.S.C. 3114(c) (Supp. III 2003).

In some circumstances involving delays between the taking of property and the payment of just compensation, courts have construed the Fifth Amendment to require the inclusion of interest in the just-compensation award. See, *e.g.*, *Albrecht* v. *United States*, 329 U.S. 599, 602 (1947); *Seaboard Air Line Ry.* v. *United States*, 261 U.S. 299, 304 (1923).[1] Until 1986, the DTA provided for

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[1] The Court in *Albrecht* explained:

> [I]n cases submitted to them for determination of "just compensation," courts have evolved a rule whereby an element of compensation designated as interest is sometimes allowed. Under this rule, and in the absence of an agreement of the parties fixing compensation, courts first fix the fair market value of property as of the time it is taken. The property owner, against whom there is no counterclaim, is always entitled to payment of this much. But where payment of that fair market value is deferred, it has been held that something more than fair market value is required to make the property owner whole, to afford him "just compensation." This

payment of simple interest at an annual rate of six percent. See 40 U.S.C. 258a (1982). In several cases decided while that version of the statute was in effect, however, courts held that interest in excess of six percent should be awarded. Those courts concluded that, because interest is a component of the just compensation to which the owner of condemned property is entitled by the Fifth Amendment, the court in a condemnation case must determine whether the rate specified by statute is constitutionally adequate. See *United States* v. *50.50 Acres of Land*, 931 F.2d 1349, 1354-1355 (9th Cir. 1991) (discussing cases decided under pre-1986 law).

Since 1986, the DTA has prescribed a fluctuating interest rate that tracks the current market. See *50.50 Acres*, 931 F.2d at 1355. In its current form, the statute authorizes the court to award interest in an amount equal to "the weekly average one-year constant maturity Treasury yield." 40 U.S.C. 3116(a)(1) (Supp. III 2003). That interest is awarded on the difference between the actual amount of just compensation (as determined in the judicial proceeding) and the estimated amount previously paid to the court. See 40 U.S.C. 3114(c)(1) (Supp. III 2003). The DTA further provides for interest to be compounded, and the applicable rate to be adjusted, on an annual basis if interest is owed for more than one year. See 40 U.S.C. 3116(a)(2) (Supp. III 2003).

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additional element of compensation has been measured in terms of reasonable interest. Thus, "just compensation" in the constitutional sense has been held, absent a settlement between the parties, to be fair market value at the time of taking plus "interest" from that date to the date of payment.

329 U.S. at 602 (footnote omitted).

2. The Ambassador Bridge connects Detroit, Michigan, with Windsor, Canada. Pet. App. 2a. Petitioner owns the Bridge, including an associated plaza located in Detroit. *Ibid.* Before 1979, trucks entering the United States awaiting secondary customs inspections on the Detroit side of the Bridge were required to park on the plaza, which contributed to traffic congestion in the area. *Ibid.* By 1979, petitioner had acquired two parcels of land that were near the Bridge but were separated from it by 21st Street (which was owned by the City of Detroit). See *id.* at 2a-3a, 9a. Those two parcels were also separated from each other by a parcel owned by an individual named Nash Sogoian. *Id.* at 3a.

In 1979, the General Services Administration (GSA) initiated a condemnation action to acquire all three parcels located across 21st Street from the Bridge (two owned by petitioner and one owned by Sogoian) for use by the Customs Service as a location for secondary truck-inspection facilities. Pet. App. 2a-3a. GSA filed a declaration of taking and deposited $828,000 as the estimated value of petitioner's condemned parcels. *Id.* at 3a. Since 1979, petitioner has contested the amount of compensation due. *Ibid.* In 1991, petitioner and the government agreed to settle the valuation dispute, but petitioner subsequently became dissatisfied with the government's performance of the agreement and sought to reopen the 1979 condemnation action. *Id.* at 3a-4a. Petitioner's case went to trial on valuation in 2002. *Id.* at 4a.

Petitioner contended that, in determining the amount of just compensation, the jury should be allowed to treat the taken parcels and the Ambassador Bridge as an integrated whole, and to consider the impact of the taking on the value of that whole, including the bridge. See Pet. App. 38a. In determining whether to allow peti-

tioner to present that theory to the jury, the district court framed the relevant inquiry as "whether the property taken consists of one entire cohesive whole"—and, in particular, whether an actual or reasonably foreseeable "unity of use" existed between the parcels at the time of the taking. *Id.* at 40a. In finding the requisite "unity of use" to be absent, the court explained:

> [T]he evidence presented in this case shows that the Government's intention to take the property was made public prior to the time that [petitioner] purchased the parcels of property at issue. [Petitioner] had specific knowledge of the intended taking at least as of December 1976. Moreover, any integrated use of the condemned property with the Bridge was dependent upon the City of Detroit's vacating of 21st Street and Nash Sogoian's sale of his parcel of land to [petitioner]. As of the date of taking, no steps were taken by [petitioner] to effectuate the vacation of 21st Street and [petitioner's] own witnesses testified that Sogoian flatly refused to sell his property to [petitioner]. Furthermore, even [petitioner's] president * * * admitted in his deposition that any integrated use of the property with the Bridge property was merely a "possibility."

Id. at 47a-48a (citation omitted).

Based on those facts, the district court concluded that, at the time of the taking, "there was no reasonable probability of the property in question being combined and used in conjunction with [petitioner's] Ambassador Bridge property in the reasonably near future." Pet. App. 48a. The court further observed that there was no private market for the intended integrated use of the condemned parcels as a customs inspection facility, and

that petitioner was not entitled to enhanced compensation based on any increase in the property's value that was attributable to the government. *Id.* at 48a-49a. The court accordingly instructed the jury that, in determining the just compensation to which petitioner was entitled, the jury could not consider the possibility that the taken parcels would have been "combined with the bridge property next door and used for overall bridge operations." *Id.* at 9a; see *id.* at 52a. The jury awarded petitioner slightly less than $4.1 million as the value of the property in 1979. *Id.* at 4a.

After the trial, the district court rejected petitioner's contention that the court should award interest at a rate higher than the rate specified in the DTA. Pet. App. 17a-27a. The court stated that, "[g]iven the mandatory language of the statute and the very clear legislative history, * * * applying any rate other than the statutory rate formulated in [the DTA] would contravene the clear intent of Congress." *Id.* at 25a. The district court further held that "the outcome would be the same" if the court inquired whether the statutory interest rate was "proper and reasonable." *Id.* at 26a. The court explained that

> the statutory rate of interest set forth in [the DTA] provides [petitioner] what a reasonable and prudent investor would earn while investing though guaranteeing the safety of the principal. The interest rate provided in [the DTA] is not a fixed rate; it is a fluctuating rate that tracks the upward and downward movement of market interest rates, generally. Thus, this method of determining interest is a market-driven rate. Second, an investment in U.S. Treasury securities is safe because an investor will not

> lose the principal underlying the investment, as he would risk doing in the stock or bond market.

Ibid. (citations omitted). In accordance with the district court's ruling, the United States deposited an additional $15,683,327.05 to satisfy the judgment. *Id.* at 5a.

3. The court of appeals affirmed. Pet. App. 1a-15a.

a. The court of appeals held that the district court had not erred in barring petitioner from arguing to the jury that the condemned parcels and the Ambassador Bridge should be considered as a unitary whole and that the parcels therefore should be valued as if the whole were to be used by petitioner in the operation of the bridge. Pet. App. 5a-11a. The court quoted at length from the district court opinion, see *id.* at 6a-7a, 9a-10a, and concluded that "[t]he district court's opinion marshals a number of facts in support of its decision," *id.* at 11a. The court of appeals stated that it "detect[ed] no error in either [the district court's] factual findings or in their application to the subsequent jury instructions." *Ibid.*

b. The court of appeals also rejected petitioner's challenge to the district court's calculation of interest. Pet. App. 11a-15a. After again quoting at length from the district court opinion, see *id.* at 12a, 13a-14a, the court found "nothing to suggest that the district court's adoption of the statutorily required rate constituted clear error," *id.* at 15a. The court of appeals concluded that, "in light of the 'reasonably prudent investor' standard, we decline to reverse the district court's decision with respect to interest rates." *Ibid.*

ARGUMENT

In seeking this Court's review, petitioner attributes to the court of appeals the holdings that (1) the method of computing interest set forth in the DTA is binding on courts adjudicating claims for just compensation, and (2) the government's stated intent to exercise its power of eminent domain can preclude valuation methodologies premised on potential use of the condemned property in combination with other tracts. Contrary to petitioner's contentions, the court of appeals did not endorse either of those propositions. Rather, the court simply affirmed the judgment of the district court. Although the district court's opinions suggest agreement with the views that petitioner finds objectionable, that court also identified other, independent grounds for its decision. Further review therefore is not warranted.

1. Petitioner contends (Pet. 11-20) that the court of appeals erroneously treated as binding the interest-computation methodology established by the DTA. That claim lacks merit and does not warrant this Court's review.

a. From its enactment in 1931 until 1986, the DTA provided for interest at a flat annual rate of six percent, regardless of the economic conditions (including market interest rates) prevailing in the country at a particular time. See Pet. App. 23a, 25a. Before the 1986 amendment to the DTA, the courts of appeals that had addressed the question had uniformly held that, notwithstanding the statute's specification of a six percent rate, the court in a condemnation case could award a greater amount of interest when that was necessary to provide just compensation. See, *e.g.*, *United States* v. *125.2 Acres of Land*, 732 F.2d 239, 244-245 (1st Cir. 1984);

United States v. *329.73 Acres of Land*, 704 F.2d 800, 812 (5th Cir. 1983) (en banc); *United States* v. *Blankinship*, 543 F.2d 1272, 1275-1276 (9th Cir. 1976).

The 1986 amendment to the DTA, which tied the statutory interest rate to the rate of return on specified Treasury bills, reflects Congress's recognition that interest awards in condemnation cases should be tied to prevailing market conditions. In supporting passage of the 1986 amendment, the Congressional Budget Office stated:

> Currently, the interest rate applicable to the taking of real estate is set by law at 6 percent. The courts generally consider this 6 percent rate to be a minimum, and usually apply a higher interest rate (based on market rates). This bill would make this current use of the market rates explicit in the law, and would make their application uniform and consistent among the courts. It also would eliminate the treatment of the interest rate as a question of fact to be determined by the courts.

H.R. Rep. No. 914, 99th Cong., 2d Sess. 3 (1986); see Pet. App. 25a.

Since the 1986 amendment to the DTA, only one other court of appeals has addressed the question whether the district court in a condemnation case may award interest in an amount higher than the statutory rate. See *50.50 Acres*, 931 F.2d at 1355-1356; Pet. 13-14. Although the Ninth Circuit in that case rejected the government's contention that the statutory computation formula should be treated as binding, see 931 F.2d at 1355-1356, it did not hold that the statutory rate was inadequate, but simply remanded the case to the district court for resolution of that question, see *id.* at 1356.

Thus, even if the Sixth Circuit in the instant case had squarely held that the DTA interest rate is binding, the question presented would not be of sufficient recurring importance to warrant this Court's review.

b. In fact, the Sixth Circuit did not purport to resolve the question whether the computation methodology specified by the DTA was binding on the district court. The district court treated the statute as conclusive, stating that "applying any rate other than the statutory rate formulated in [the DTA] would contravene the clear intent of Congress." Pet. App. 25a. As an alternative ground for its decision, however, the district court stated that "the outcome would be the same" if the court were to inquire, in accordance with the Ninth Circuit's decision in *50.50 Acres*, "whether the new [DTA] formula provides a 'proper and reasonable' interest rate." *Id.* at 26a. The court explained that the statutory computation methodology "provides [petitioner] what a reasonable and prudent investor would earn while investing though guaranteeing the safety of the principal," because the DTA in its current form establishes "a fluctuating rate that tracks the upward and downward movement of market interest rates, generally." *Ibid.* The district court also observed that "an investment in U.S. Treasury securities is safe because an investor will not lose the principal underlying the investment, as he would risk doing in the stock or bond market." *Ibid.*[2]

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[2] Petitioner contends (Pet. 18) that, even if the DTA interest formula (which is tied to the rate of return on one-year Treasury bills) "might be an acceptable proxy for a reasonably prudent investor's one-year investment, it is not sufficient to provide a rate of return on a 20-year investment." But the Constitution surely does not require Congress to establish different interest formulas based on the length of time required for resolution of particular litigation. Inter alia, the fortuity

In affirming the district court's judgment on this issue, the court of appeals explained that "there is nothing to suggest that the district court's adoption of the statutorily required rate constituted clear error; in light of the 'reasonably prudent investor' standard, we decline to reverse the district court's decision with respect to interest rates." Pet. App. 15a. The Sixth Circuit thus held only that, given the district court's factual determination that the DTA "provides [petitioner] what a reasonable and prudent investor would earn," *id.* at 14a (quoting *id.* at 26a), the district court had not committed clear error in adopting the statutory rate. The Sixth Circuit expressed no view about whether, or under what circumstances, a district court might ever be justified in using a formula other than that specified in the DTA to compute interest in a condemnation case.

c. Petitioner is therefore wrong in contending (Pet. 13-14) that the Sixth Circuit's decision in this case conflicts with the Ninth Circuit's post-1986 ruling in *50.50 Acres*. And petitioner's claim of a conflict with pre-1986 court of appeals decisions (see Pet. 11-13) is wrong for two independent reasons. First, as explained above, the Sixth Circuit did not hold in this case that the current DTA formula is binding on the courts. Second, the formula set forth in the 1986 DTA amendments, which is tied to current market rates, may be regarded as a legis-

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that a particular lawsuit was unusually protracted—a fact that would not likely be apparent at the outset of the suit—has no evident bearing on what use of the additional funds a "reasonable and prudent" investor would have made if he had been fully compensated at the time of the taking. In order to avoid under-compensating condemnees whose cases take more than a year to resolve, the DTA requires interest to be compounded, and the applicable rate adjusted, on an annual basis. See 40 U.S.C. 3116(a)(2) (Supp. III 2003).

lative specification of the methodology to be used in determining what a "reasonable and prudent" investor would have earned during a particular period of time. By contrast, the pre-1986 six percent rate remained in effect for 55 years, and its application was unaffected by market fluctuations during that period. Decisions holding that courts under the pre-1986 DTA could make their own determinations of the rate of return that a "reasonable and prudent" investor might have earned, notwithstanding Congress's specification of a six percent rate, therefore have little bearing on the scope of judicial authority under the current statute.

Moreover, "[t]he constitutional requirement of just compensation derives as much content from the basic equitable principles of fairness, as it[] does from technical concepts of property law." *United States* v. *Fuller*, 409 U.S. 488, 490 (1973) (citation omitted). The DTA promotes justice and fairness by seeking to eliminate the inconsistencies among cases and property owners that had been experienced prior to the 1986 amendments. Congress's legislative judgment about an appropriate methodology for addressing the problems created under prior law would at least be entitled to great judicial respect, whether or not it is regarded as "binding" upon the courts.

2. Petitioner argued in the district court that its just compensation award should reflect the potential for the two condemned parcels to function as part of an integrated whole that would have included the Ambassador Bridge. Petitioner thus sought "severance damages" —*i.e.*, compensation for the diminution in value of the Ambassador Bridge (which was not taken) that was allegedly caused by petitioner's loss of ownership of the neighboring parcels. See Pet. App. 38a-39a. In barring

petitioner from presenting that theory to the jury, the district court noted that "the Government's intention to take the property was made public prior to the time that [petitioner] purchased the parcels of property at issue." *Id.* at 47a. Petitioner contends (Pet. 20-26) that the court of appeals endorsed that rationale, and that this purported holding conflicts with this Court's precedents. That argument lacks merit and does not warrant review.

a. In holding that "there was no reasonable probability of the property in question being combined and used in conjunction with [petitioner's] Ambassador Bridge property in the reasonably near future," Pet. App. 48a, the district court did not rely solely or even primarily on the fact that the government's condemnation plan was apparent when petitioner bought the condemned tracts. Rather, the court also attached significance to the fact that "any integrated use of the condemned property with the Bridge was dependent upon the City of Detroit's vacating of 21st Street and Nash Sogoian's sale of his parcel of land to [petitioner]." *Id.* at 47a. The court explained that, "[a]s of the date of taking, no steps were taken by [petitioner] to effectuate the vacation of 21st Street and [petitioner's] own witness testified that Sogoian flatly refused to sell his property to [petitioner]." *Ibid.* The district court further observed that the evidence was "overwhelming" that petitioner's "intended integrated use of the property was for U.S. Customs to use it for truck inspection," *id.* at 48a, and the court explained that petitioner was not entitled to increased compensation based on the prospect of a distinctly governmental use of the land, see *id.* at 49a. Accord, *e.g.*, *United States* v. *Chandler-Dunbar Water Power Co.*, 229 U.S. 53, 80-81 (1913); *United States* v. *320.0 Acres of Land*, 605 F.2d 762, 781 (5th Cir. 1979);

United States v. *Weyerhaeuser Co.*, 538 F.2d 1363, 1366-1367 (9th Cir.), cert. denied, 429 U.S. 929 (1976); *United States* v. *46,672.96 Acres of Land*, 521 F.2d 13, 15-16 (10th Cir. 1975). Petitioner does not seek review of any question pertaining to those aspects of the district court's analysis, which provide fully sufficient (and largely fact-specific) grounds for the court's refusal to submit the "integrated use" theory to the jury.[3]

b. In affirming the district court's judgment, the Sixth Circuit did not discuss the legal significance of the evidence showing that petitioner had bought the relevant parcels with notice of the government's plan to condemn the land. Rather, the court of appeals quoted at length from the district court's opinion, see Pet. App. 9a-10a, and stated that the district court had "marshal[ed] a number of facts in support of its decision to preclude the jury from considering the valuation theories proposed by [petitioner]," *id.* at 11a. Although the court of appeals stated that it "detect[ed] no error in either [the district court's] factual findings or in their application to the subsequent jury instructions," *ibid.*, the court did not explicitly address the question on which petitioner seeks review.

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[3] Petitioner suggests in passing (Pet. 22 n.13) that the district court excluded valuation evidence based on potential integrated uses other than use of the condemned parcels as a customs inspection facility. The testimony on which petitioner relies referred in general terms to the potential use of the condemned parcels for "expansion" of the Bridge or to provide "additional flexibility." Pet. App. 123a. The only *specific* potential use of the parcels that the witness identified, however, was potential use as the site of inspection facilities. See *id.* at 124a-125a. In any event, the district court's assessment of the record evidence on this point raises no legal issue of broad significance, and no challenge to the district court's findings as to potential integrated uses is fairly encompassed by the questions presented.

There is consequently no basis for petitioner's contention (Pet. 22) that the Sixth Circuit's decision "rested primarily on the court's finding that the government's plans to condemn the two parcels had been made public before [petitioner] acquired the parcels." And even if the Sixth Circuit had unequivocally endorsed the legal proposition that petitioner finds objectionable, the presence of independent grounds for affirmance would make this case an unsuitable vehicle for this Court's resolution of the question presented.[4]

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[4] Even if the Sixth Circuit had issued the holding that petitioner attributes to it, the decision below would not squarely conflict with any of this Court's precedents or with decisions of other courts of appeals. Although this Court has held that changes in property value attributable to the government's anticipated use of its condemnation power should generally be ignored in determining just compensation under the "fair market value" standard, see, *e.g.*, *United States* v. *Virginia Elec. & Power Co.*, 365 U.S. 624, 635-636 (1961); *United States* v. *Cors*, 337 U.S. 325, 332 (1949); *City of New York* v. *Sage*, 239 U.S. 57, 61 (1915), the Court has not addressed the specific question whether a landowner who acquires property with knowledge of the government's intent to condemn it may obtain a just compensation award that is premised on the potential use of that land in combination with other parcels, and petitioner acknowledges (Pet. 22 n.12) that no circuit conflict exists on this issue.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 2007

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(4)

No. 06-639

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v.

UNITED STATES,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
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REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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OTHER AUTHORITIES

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This case presents two important questions concerning the just compensation required by the Fifth Amendment. The first—whether Congress can constitutionally fix the interest-rate component of just compensation in all cases—raises fundamental separation-of-powers concerns. Contrary to the government's suggestion, the question is one that has genuinely divided the courts of appeals, and, as that division suggests, the question has recurring significance. The Sixth Circuit's determination that courts are powerless to look behind the statutory rate based on the facts of a particular case also conflicts with this Court's longstanding precedents, a point the Solicitor General does not address. For all these reasons, review by this Court is warranted.

The Sixth Circuit's resolution of the second question presented—whether the United States is entitled to avoid paying full compensation when the owner of the condemned property acquired it after the planned condemnation became public—conflicts with this Court's repeated holding that an owner's anticipation of a taking does not affect the compensation due. The rule endorsed by the court of appeals permits a government windfall in such circumstances, yielding incongruous compensation amounts depending on when the taken land last changed hands and threatening the security of ownership that the Just Compensation Clause is intended to protect.

I. WHETHER THE INTEREST RATE SPECIFIED BY CONGRESS IS MANDATORY WARRANTS THIS COURT'S REVIEW

1. Contrary to the government's contention, the conflict between the Sixth and Ninth Circuits over the binding character of the Declaration of Taking Act's (DTA) interest-rate formula is genuine.

The Solicitor General concedes that the district court "treated the [DTA] as conclusive." Opp. 10. And he acknowledges that, with little reasoning, the court of appeals "simply affirmed the judgment of the district court." Opp. 8. The United States nonetheless insists that "[t]he Sixth Circuit expressed no view about whether, or under what circumstances, a district court might ever be justified in using

a formula other than that specified in the DTA." Opp. 11. That characterization is inconsistent with what the Sixth Circuit said.

In describing the holding it affirmed, the Sixth Circuit referred to the "district court's adoption of the *statutorily required* rate." Pet. App. 15a (emphasis added). Nearly half of the Sixth Circuit's discussion of the interest-rate issue consists of an extended quotation from the district court's explanation of why, "[g]iven the mandatory language of the statute and the very clear legislative history, . . . applying any rate other than the statutory rate . . . would contravene the clear intent of Congress." *Id.* at 14a (internal quotation marks omitted). The passage quoted approvingly by the Sixth Circuit continues:

> The Court is unaware of any precedent or doctrine . . . that would permit the Court to ignore such a clear legislative mandate. The fact that determining just compensation is a judicial function does not render calculation of interest on that compensation a judicial function where Congress has clearly indicated its intention to fully occupy the field in this area.

Id. (internal quotation marks omitted). Far from expressing "no view" about when courts may deviate from the DTA's interest rate (Opp. 11), the Sixth Circuit plainly embraced the position adopted by the district court that the DTA rate is binding on the courts.

The government argues (Opp. 10-11) that the Sixth Circuit did not do so because, in its view, the district court identified an alternative ground, namely, that the DTA's rate provides what a reasonably prudent investor would earn. Even if one were to treat the Sixth Circuit's single reference to the " 'reasonably prudent investor' standard" (Pet. App. 15a) as approving the district court's analysis, that analysis does not alleviate the conflict between the Sixth Circuit's decision and the Ninth Circuit's holding in *United States* v. *50.50 Acres of Land*, 931 F.2d 1349 (9th Cir. 1991).

As the United States acknowledges, *50.50 Acres* flatly "rejected the government's contention that the statutory . . .

formula should be treated as binding." Opp. 9 (citing *50.50 Acres*, 931 F.2d at 1355-1356). The *50.50 Acres* court held that courts must be free to make an independent determination of whether the statutory rate would provide what " 'a reasonably prudent person investing funds so as to produce a reasonable return while maintaining safety of principal' would receive." 931 F.2d at 1355 (quoting *United States* v. *429.59 Acres of Land*, 612 F.2d 459, 465 (9th Cir. 1980)). The court stressed that the adequacy of the statutory rate must be assessed based on "the factual circumstances of the case" and "a variety of investment measures." *Id.*[1] It recognized that the DTA "attempts to create a variable interest rate reflective of market changes" but concluded that consideration was plainly inadequate to make the statutory rate constitutionally sufficient in all cases. *Id.* at 1356.

The district court's brief discussion of the constitutional sufficiency of the DTA's rate wholly ignored the case-specific considerations that *50.50 Acres* emphasizes. Having refused to hold a hearing, the court made no mention of the factual circumstances of this case, such as the extraordinarily extended delay (more than 20 years), the relative size of the ultimate valuation compared to the government's initial valuation (almost five times as great), and, in turn, the significance of the interest component to the amount the government ultimately paid (roughly 80 percent of the total). Nor did the district court address other interest rates available from creditworthy institutions.[2]

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[1] The government has previously acknowledged the Ninth Circuit's emphasis on the factual circumstances of the case. *See* Gov't Br., *United States* v. *191.07 Acres of Land*, No. 04-35131, 2005 WL 3190268, at *81 (9th Cir. Aug. 31, 2005) (relying on the statement in *50.50 Acres*, 931 F.2d at 1355, that "[u]nder [*United States* v. *Blankinship*, 543 F.2d 1272 (9th Cir. 1976)], the court must first determine if the statutory formula is constitutionally inadequate given the factual circumstances of the case").

[2] The government argues that at least one important factual circumstance, the duration of the government's delay in payment, is irrelevant to the interest rate that ought to apply. *See* Opp. 10 n.2. But it offers no authority for that view. Courts applying the DTA have often stressed the

Rather than determining whether, in light of the particular circumstances, the statutory rate ensured petitioner the just compensation to which it is constitutionally entitled, the district court's brief analysis simply identified two general considerations that, in its view, made the statutory rate adequate overall. The first—that the statutory rate "is not a fixed rate" but rather "is a fluctuating rate that tracks the upward and downward movement of market interest rates, generally" (Pet. App. 26a)—was exactly the characteristic that the *50.50 Acres* court determined was insufficient to render the statutory rate constitutionally adequate per se. The second—that investment "in U.S. Treasury securities is

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duration of the delay in determining the appropriate interest rate. *See United States* v. *Blankinship*, 543 F.2d 1272, 1276 (9th Cir. 1976) ("the trial court should have focused more on that type of marketable public debt security which constitutes a direct obligation of the United States Treasury having a duration approximating the period during which the deficiency was unpaid); *United States* v. *5.00 Acres of Land, More or Less, Situate in Orange County, Tex.*, 507 F. Supp. 589, 599 (E.D. Tex. 1981) (stating that "a rate of no greater than six percent . . . would contravene the [F]ifth [A]mendment" due to "the great disparity between the amount of estimated compensation deposited into the Registry of the Court by the Plaintiff and the significant delay between such deposit and the date of the judgment," and awarding interest on the per annum rate "applicable to three-year Treasury bonds" (footnote omitted)), *rev'd on other grounds*, 680 F.2d 388 (5th Cir. 1982). And in non-DTA takings cases, courts likewise have recognized the relevance of the length of the delay in payment. *See Tulare Lake Basin Water Storage Dist.* v. *United States*, 61 Fed. Cl. 624, 630 (2004) (declining to apply the DTA rate in a non-DTA case because the delay in payment had been substantial and the DTA's "52-week Treasury bill rate was not intended to account for long periods of delay in the payment of just compensation and . . . does not reflect the financial impact from the perspective of the property owner").

The government implies (Opp. 4) that some fault lies with petitioner for "reopening" the condemnation action after "petitioner and the government agreed to settle." What the government characterizes as the "reopening" was necessitated by the government's failure to comply with the terms of the settlement agreement, which DIBCO viewed as a breach of the agreement. Pet. App. 3a-4a. Before the court of appeals, the government did not suggest that any delay in resolving the condemnation question was due to petitioner or that petitioner's actions somehow absolve the government of providing just compensation for the taking.

safe because an investor will not lose the principal underlying the investment, as he would risk doing in the stock or bond market" (*id.*)—applies to any government bond, including low-yielding 30-day Treasury bills. As the Ninth Circuit's insistence on consideration of the factual circumstances makes clear, the general factors identified by the district court cannot determine the propriety of a particular rate in a given case as they do not distinguish among a wide array of potential investments.

The district court's analysis, then, neither reduces the Sixth Circuit's conflict with *50.50 Acres* nor suggests that the result in this case would have been the same if the *50.50 Acres* approach had been followed.

2. The Sixth Circuit's decision also conflicts with the uniform pre-1986 courts of appeals' decisions holding that the DTA's rate is not binding on the courts in all cases. The government attempts to distinguish the pre-1986 cases by contrasting the fluctuating rate incorporated into the DTA in 1986 with the prior fixed rate. Opp. 8-9, 11-12. But the pre-1986 decisions rejecting the mandatory character of the statutory interest rate did not turn on the courts' assessment of how frequently the statutory rate might approximate the return that would have been achieved by a reasonable and prudent investor and so provide the just compensation required. *See* Pet. 11-14. Those decisions turned simply on whether Congress had the constitutional authority to bar independent judicial assessment of just compensation. The *50.50 Acres* court recognized as much in affirming the relevance of those earlier decisions to its own analysis: "nothing in the new statute can change the Supreme Court's determination that just compensation 'is a judicial[,] not a legislative[,]' function." 931 F.2d at 1355-1356 (quoting *Monongahela Navigation Co.* v. *United States*, 148 U.S. 312, 327 (1892)). The Solicitor General conspicuously fails to identify anything in the reasoning of those earlier decisions to challenge petitioner's characterization of them.

The government's suggestion (Opp. 12) that the pre- and post-1986 rates are constitutionally distinct because in the

new rate Congress was specifying the "methodology to be used" in the reasonably prudent investor standard is similarly flawed. Congress can determine the "reasonably prudent investor" standard—a proxy for just compensation in the interest arena—no more than it can determine just compensation itself. The point of precedents such as *Monongahela* is that Congress cannot limit "the scope of judicial authority" (Opp. 12) where those limits would deny just compensation.

3. Thus, as explained in the petition (at 14-17), the Sixth Circuit's decision also conflicts with this Court's long-standing precedents holding that the determination of just compensation is ultimately a judicial, not a legislative, function. The government makes no effort to square the Sixth Circuit's decision with those rulings.

4. The question is of recurring importance. The disagreement among the courts of appeals is one indication of that importance. Another is the regularity with which the United States relies on the DTA. In the last year alone, it has instituted at least 35 condemnations pursuant to the Act.[3] And courts in non-DTA takings cases look for guidance to the interest rate under the DTA in determining the applicable interest rate.[4] Thus, a decision by this Court clarifying that Congress may not predetermine the interest rate in every DTA case would have broad significance.

5. On the merits, the government defends Congress's one-size-fits-all one-year Treasury-bond rate by contending that "the constitutional requirement of just compensation" derives from "basic equitable principles of fairness" and that the DTA promotes fairness by promoting consistency. Opp. 12. This Court, however, has never accepted the notion that

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[3] This figure is based on a search on the LexisNexis Courtlink Service of all district court civil dockets in which the United States was plaintiff, the nature of suit was a land condemnation, and a docket entry contained the words "declaration" and "takings." The individual dockets were then examined to confirm that they were in fact DTA actions.

[4] *See, e.g.*, *Vaizburd* v. *United States*, 67 Fed. Cl. 499, 504 (2005); *NRG Co.* v. *United States*, 31 Fed. Cl. 659, 668-669 (1994).

the individual property owner's right to just compensation may be sacrificed in the name of consistency or administrability. It should not do so now. Indeed, this Court has long stressed that it has been "careful not to reduce the concept of 'just compensation' to a formula," *United States* v. *Cors*, 337 U.S. 325, 332 (1949). *See United States* v. *Toronto, Hamilton & Buffalo Navigation Co.*, 338 U.S. 396, 402 (1949) ("Perhaps no warning has been more repeated than that the determination of value cannot be reduced to inexorable rules."). It should not permit Congress to do so either.

II. WHETHER AWARENESS OF A PLANNED GOVERNMENT TAKING PRECLUDES VALUATION BASED ON COMBINED USE WARRANTS THIS COURT'S REVIEW

1. The United States (Opp. 13-15) contests the notion that in refusing to permit petitioner to introduce evidence of combined use, the district court relied principally on the fact that the government had made its condemnation plan public before petitioner acquired the land. The Solicitor General asserts that the district court had two alternate grounds for that holding: the perceived need to acquire an additional parcel to effectuate the combined use and the likelihood that the land taken would be used for a governmental purpose, namely, Customs inspections. The first, however, is not an independent ground for the district court's decision. The second was not ruled upon by the court of appeals and so is no bar to review by this Court of the question presented.

a. In order to constitute an alternate ground for the district court's determination, the perceived need to acquire an additional parcel to effectuate the combined use must have been an independently sufficient basis for the district court's conclusion. The opinions of both the district court and the court of appeals indicate that it was not. The government does not dispute that petitioner's awareness of its planned taking was the first factor relied upon by the district court. Nor does it suggest that the court anywhere indicated that any other factor, including the need for other

property purchases, alone would have led the district court to find no reasonable probability of combined use.[5] The Sixth Circuit acknowledged (Pet. App. 9a) that the district court weighed this factor, but it too said nothing to suggest that this factor was independently sufficient. To the contrary, the Sixth Circuit characterized the reasonable probability of combined use as a "close question," *id.* at 11a, suggesting that absent reliance on petitioner's knowledge of the taking, the court would have come out the other way.

b. The district court's conclusion that combined-use value could not be considered because the taken parcels would be used for Customs inspections was vigorously disputed on appeal but not addressed by the Sixth Circuit. As the Solicitor General has previously argued, alternate grounds decided by a district court but not ruled upon by a court of appeals do not bar review in this Court. In petitioning (successfully) for this Court's review of *Bean* v. *United States Bureau of Alcohol, Tobacco, & Firearms*, 253 F.3d 234 (5th Cir. 2001), for example, the United States responded to the very argument it now makes by correctly stating that "when an issue resolved by a court of appeals warrants review, the existence of a potential alternative ground relied upon by the district court, but not addressed by the court of appeals, is not a barrier to such review." Gov't Reply Br. in Support of Cert., No. 01-704, 2002 WL 32101203, at *3 (Jan. 10, 2002). The government highlighted the Court's grants of certiorari in *Edelman* v. *Lynchburg College*, 535 U.S. 106 (2002), and *Ashcroft* v. *American Civil Liberties Union*, 535

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[5] Petitioner disputed below whether the additional purchase was needed as a factual matter. *See* DIBCO C.A. Br. 9 (citing tr. 686-687). But even if it had been, *Olson* v. *United States*, 292 U.S. 246 (1934), suggests that fact would not preclude a combined-use valuation. *Olson* holds that the availability of combined-use valuation depends on whether there is a "reasonable possibility that the owner could use his tract together with the other[s] . . . for [particular] purposes *or that another could acquire all lands or easements necessary for that use*." *Id.* at 256-257 (emphasis added). *Olson* does not tie the availability of combined-use valuation to the identity of the combined user.

U.S. 564 (2002), two cases in which the courts of appeals did not address potential alternate grounds that had been decided by the district court. As these cases show, any alternate grounds relied upon by the district court but not addressed by the Sixth Circuit do not preclude this Court's review.

2. The government argues (Opp. 14) that petitioner is attributing a holding to the Sixth Circuit that its opinion does not expressly state. But the part of the district court's opinion concerning valuation theories that the Sixth Circuit quotes begins with the district court's discussion of petitioner's awareness of the pending taking. The Sixth Circuit lists the factors relied upon by the district court, finds no errors in its analysis, and agrees with the district court's conclusion on what it deems a "close question." Pet. App. 11a. In such circumstances, it is unclear how the Sixth Circuit's opinion can be read *not* to sanction the district court's conclusion that petitioner's awareness of the planned taking may factor into the combined-use analysis.

3. The government contends (Opp. 15 n.4) that, in any event, the Sixth Circuit's decision does not conflict with decisions of any other circuit or this Court. The United States is wrong about this Court's decisions. Indeed, it concedes (*id.*) that this Court has repeatedly held that "changes in property value attributable to the government's anticipated use of its condemnation power should generally be ignored in determining just compensation under the 'fair market value' standard."

The United States tries to distinguish these decisions (Opp. 15 n.4) on the ground that they address what it calls "the 'fair market value' standard," not valuation based on "potential use of that land in combination with other parcels." This is a false distinction. Combined-use analysis is a method of determining the just compensation due for taken property and thus is a particular application of what the government terms the "fair market value standard." That much is clear from this Court's seminal combined-use decision, *Olson* v. *United States*, 292 U.S. 246 (1934), a case the Solicitor General does not even acknowledge. *Olson* set

forth the fair market value standard, holding that "[j]ust compensation includes all elements of value that inhere in the property, but it does not exceed market value fairly determined." *Id.* at 255. The Court explained (*id.* at 255-256):

> The sum required to be paid the owner . . . is to be arrived at upon just consideration of all the uses for which it is suitable. The highest and most profitable use for which the property is adaptable and needed or likely to be needed in the reasonably near future is to be considered, not necessarily as the measure of value, but to the full extent that the prospect of demand for such use affects the market value while the property is privately held. The fact that the most profitable use of a parcel can be made only in combination with other lands does not necessarily exclude that use from consideration if the possibility of combination is reasonably sufficient to affect market value.

The Court then held that "the fact that [the property] may be or is being acquired by eminent domain" is not "negative consideration of availability" for other uses. *Id.* at 256.

Olson thus demonstrates that combined-use analysis is one means to determine fair market value. It also supports petitioner's view that the planned condemnation may not play a role in determining the reasonableness of the proposed combined use, or the valuation of the land in turn. *See* Pet. 20-23. The government makes no attempt to justify why the planned condemnation ought to affect just compensation and permit a government windfall. Because the Sixth Circuit's decision conflicts with *Olson* and other decisions by this Court, and because it enables the United States to deprive property owners of the just compensation to which they are constitutionally entitled, review is warranted.

CONCLUSION

For the foregoing reasons, as well as those previously articulated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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In the

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DETROIT INTERNATIONAL BRIDGE COMPANY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION, NATIONAL TAXPAYERS UNION, AND NEW ENGLAND LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. The Constitution's "Just Compensation" Clause entitles an owner to be made whole when the government takes property for public use. The Declaration of Taking Act (40 U.S.C. § 3116) holds that where a property owner's receipt of compensation is delayed longer than a year, the owner is entitled to interest at only a statute-based percentage, which in this case is $38 million less than the amount that the Detroit Bridge's owners might have realized if they had received compensation at the time of the taking. Does the Act so interpreted violate the Just Compensation Clause?

2. May the decrease in property value resulting from the government's announcement that it intends to use eminent domain be a basis for a decreased just compensation award?

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Foster v. City of Detroit,
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Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229 (1984) 1

Hsiung v. City & County of Honolulu,
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Illinois State Toll Highway Auth. v.
American Nat'l Bank & Trust Co. of Chicago,
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Jacobs v. United States, 290 U.S. 13 (1933) 4, 6-7

Kelo v. City of New London,
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Kirby Forest Indus., Inc. v. United States,
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Kissinger v. City of Los Angeles,
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Liberty Square Development Trust v.
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Madison Realty Co. v. City of Detroit,
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Matsuda v. City & County of Honolulu,
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Maxey v. Redevelopment Auth. of Racine,
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Merkur Steel Supply, Inc. v. City of Detroit,
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app. denied 688 N.W.2d 502 (Mich. 2004) 13

Monongahela Navigation Co. v. United States,
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Olson v. United States, 292 U.S. 246 (1934) 10

Palazzolo v. Rhode Island, 533 U.S. 606 (2001) 1, 8-9

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Richmond Elks Hall Ass'n v.
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S.D. Warren Co. v. Maine Bd. of Envtl. Protection, 126 S. Ct. 1843 (2006) 2

San Remo Hotel, L.P. v. City & County of San Francisco, 545 U.S. 323 (2005) 2

Seaboard Air Line Ry. Co. v. United States, 261 U.S. 299 (1923) 4-7

Shoshone Tribe of Indians of the Wind River Reservation in Wyoming v. United States, 299 U.S. 476 (1937) 4, 7

State by Humphrey v. Jim Lupient Oldsmobile Co., 509 N.W.2d 361 (Minn. 1993) 4

Suitum v. Tahoe Reg'l Planning Agency, 520 U.S. 725 (1997) 1

United States v. 125.2 Acres of Land, More or Less, Situated in the Town & County of Nantucket, Mass., 732 F.2d 239 (1st Cir. 1984) 4

United States v. 329.73 Acres of Land, Situated in Grenada & Yalobusha Counties, Miss., 704 F.2d 800 (5th Cir. 1983) 4

United States v. Blankinship, 543 F.2d 1272 (9th Cir. 1976) 4

United States v. Certain Land Situated in the City of Detroit, 450 F.3d 205 (6th Cir. 2006) 4, 8

United States v. Certain Land Situated in the City of Detroit, 188 F. Supp. 2d 747 (E.D. Mich. 2002) 9

United States v. Jacobs, 63 F.2d 326 (5th Cir. 1933) 6

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United States v. Seaboard Air Line Ry. Co.,
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United States v. Virginia Elec. & Power Co.,
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Miscellaneous

Berliner, Dana, *Opening the Floodgates: Eminent Domain Abuse in a Post-Kelo World* (2006), *available at* http://www.castlecoalition.org/pdf/publications/flood gates-report.pdf (last viewed Feb. 1, 2007) 14

H.R. 14255, 71st Cong. (1931) 3

H.R. 4577, 106th Cong. (2000) 3

TABLE OF AUTHORITIES—Continued

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H.R. 4961, 65th Cong. (1917) 5

H.R. 5363, 99th Cong. (1986) 3

Kanner, Gideon, *What to Do Until the Bulldozers Come? Precondemnation Planning for Landowners*, 27 Real Est. L.J. 47 (1998) 14

Lazzarotti, Joseph J., *Public Use or Public Abuse*, 68 UMKC L. Rev. 49 (1999) 14

Leigh, William C. & Burton, Bruce W., *Predatory Governmental Zoning Practices and the Supreme Court's New Takings Clause Formulation: Timing, Value, and R.I.B.E.*, 1993 B.Y.U. L. Rev. 827 (1993) 11

Merrill, Thomas W., *The Economics of Public Use*, 72 Cornell L. Rev. 61 (1986) 14

Michelman, Frank I., *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 Harv. L. Rev. 1165 (1967) .. 12

Romero, Alan, *Reducing Just Compensation for Anticipated Condemnations*, 21 J. Land Use & Envtl. L. 153 (2006) 10

IDENTITY AND INTEREST OF AMICI CURIAE[1]

Pursuant to Supreme Court Rule 37.2(a), Pacific Legal Foundation (PLF), New England Legal Foundation (NELF) and National Taxpayers Union (NTU) respectfully submit this brief amicus curiae in support of the petition for a writ of certiorari. Written consent was granted by the counsel for all parties and lodged with the Clerk of the Court.

Pacific Legal Foundation was founded over 30 years ago and is widely recognized as the largest and most experienced nonprofit legal foundation defending private property rights, economic freedom, and constitutional limitations. PLF litigates matters affecting the public interest at all levels of state and federal courts representing property owners before this Court in *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725 (1997); and *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987); and appearing as amicus curiae in *Kelo v. City of New London*, 545 U.S. 469, 125 S. Ct. 2655 (2005); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); and *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229 (1984).

New England Legal Foundation is a non-profit, public interest law firm whose membership consists of corporations, law firms, individuals, and others who believe in promoting balanced economic growth for the United States and the New England region, protecting the free enterprise system, and defending economic rights. NELF has regularly appeared in state and federal courts, as party or counsel before this Court and other courts, in cases raising issues of general economic

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[1] Pursuant to Supreme Court Rule 37.6, amici affirm that no counsel for any party authored this brief in whole or in part. No person or entity, other than amici curiae, their members, or their counsel, made a monetary contribution specifically for the preparation or submission of this brief.

significance to the New England and national business communities. *See, e.g., Rapanos v. United States*, 126 S. Ct. 2208 (2006); *S.D. Warren Co. v. Maine Bd. of Envtl. Protection*, 126 S. Ct. 1843 (2006); *Kelo*, 545 U.S. 469, 125 S. Ct. 2655; *San Remo Hotel, L.P. v. City & County of San Francisco*, 545 U.S. 323 (2005).

National Taxpayers Union is a nonpartisan citizen group founded in 1969 to work for lower taxes, smaller government, and more accountability for elected officials at all levels. NTU's 350,000 members favor preserving the personal and property safeguards included in the United States Constitution and espouse the principle that private property rights are the foundation upon which a free society is built.

Because of their history and experience with regard to property rights in eminent domain, PLF, NTU, and NELF believe their perspective will aid this Court in considering the petition.

SUMMARY OF ARGUMENT

This case presents the Court with essential questions about valuation under the Just Compensation Clause when property is taken through eminent domain. Given the nation's increased attention to issues related to condemnation since *Kelo*—which did not address the compensation element in eminent domain cases, 125 S. Ct. at 2668 n.21—and given the increasing use of eminent domain for economic development projects since *Kelo* was decided, this petition presents an important opportunity to answer questions of growing national import.

The petition should be granted for at least three reasons.

1. The decision below conflicts with holdings of this Court, as well as the First, Fifth, and Ninth Circuits, by holding that the Declaration of Taking Act imposes a maximum limit, rather than a minimum, on the interest to which a property

owner is entitled on a compensation award when payment is delayed.

2. The decision below conflicts with this Court's holdings as well as the holdings of several state courts, that the government may not use its own announcement of an intent to condemn property, or the effects such an announcement has on property values, to pay less for the land that it eventually condemns.

3. The use of government authority to diminish the value of property prior to condemnation is a serious abuse that has yet to be addressed by this Court. Given the broad authority to condemn valuable property recognized by *Kelo*, this problem must be addressed to stop further abuse of property owners.

ARGUMENT

I

THE SIXTH CIRCUIT'S HOLDING THAT THE DECLARATION OF TAKING ACT IMPOSES A CEILING ON COMPENSATION INTEREST CONFLICTS WITH DECISIONS BY THIS COURT AND OTHER CIRCUIT COURTS

The Declaration of Taking Act, 40 U.S.C. § 3116, provides a formula for determining the interest paid on "just compensation" when that compensation is delayed long after the taking of property.[2] The Sixth Circuit held that this formula

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[2] The original version of the Act, H.R. 14255, 71st Cong. (1931), provided that interest was to be calculated at the rate of 6%. *See id.* § 1. Congress tied the rate to the one-year Treasury bill in 1986, *see* H.R. 5363, 99th Cong. (1986), and set the Act's current language in 2000, *see* H.R. 4577, 106th Cong. (2000). That language was necessitated by the discontinuance of the fifty-two week Treasury bill. *See Liberty Square Development Trust v. City of Worcester*, 808 N.E.2d 245, 256 n.17 (Mass. 2004).

imposes a ceiling above which no federal court may go in awarding constitutionally required compensation. *United States v. Certain Land Situated in the City of Detroit*, 450 F.3d 205, 213 (6th Cir. 2006). Petitioner has shown how that holding conflicts with the holdings of several courts of appeals. *See* Pet. for Cert. at 11-14 (citing *United States v. Blankinship*, 543 F.2d 1272 (9th Cir. 1976); *United States v. 329.73 Acres of Land, Situated in Grenada & Yalobusha Counties, Miss.*, 704 F.2d 800 (5th Cir. 1983) (*en banc*); *United States v. 125.2 Acres of Land, More or Less, Situated in the Town & County of Nantucket, Mass.*, 732 F.2d 239 (1st Cir. 1984)).[3] But it is equally important to recognize that the decision below is also irreconcilable with this Court's jurisprudence on the requirements of the Just Compensation Clause. The general rule is that just compensation is the fair market value of the property taken as measured on the date of taking. *United States v. New River Collieries Co.*, 262 U.S. 341, 343 (1923); *Kirby Forest Indus., Inc. v. United States*, 467 U.S. 1, 10 (1984). As a corollary, this Court has repeatedly held that just compensation also normally includes interest on the value of the taken property in cases where payment of compensation is delayed. *Id. See Shoshone Tribe of Indians of the Wind River Reservation in Wyoming v. United States*, 299 U.S. 476, 496-97 (1937); *Jacobs v. United States*, 290 U.S. 13, 28 (1933); *Phelps v. United States*, 274 U.S. 341, 343-44 (1927); *Brooks-Scanlon Corp. v. United States*, 265 U.S. 106, 123 (1924); and *Seaboard Air Line Ry. Co. v. United States*, 261 U.S. 299, 306 (1923).

Although the Act has influenced the provision of just compensation for decades, this Court has never addressed

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[3] State courts have also recognized that the determination of just compensation cannot be dictated by statutorily imposed interest rates. *See, e.g., Illinois State Toll Highway Auth. v. American Nat'l Bank & Trust Co. of Chicago*, 642 N.E.2d 1249, 1253 (Ill. 1994); *State by Humphrey v. Jim Lupient Oldsmobile Co.*, 509 N.W.2d 361, 363-64 (Minn. 1993).

whether it is constitutionally proper to view the Act as imposing a maximum limit on the rate of interest. *See Kirby Forest Indus.*, 467 U.S. at 11 n.16 (noting that United States had acquiesced in circuit courts' interpretation of original version of Act as imposing a floor, not a ceiling, to the rate of interest). Yet it has frequently stated that a bare failure to provide interest would violate the Just Compensation requirement. The Court has therefore interpreted statutes that are silent on the subject as including an interest requirement.

In *Seaboard Air Line*, for instance, the plaintiff sought compensation under the Lever Act, H.R. 4961, 65th Cong. (1917), for property requisitioned during the First World War. The Act did not expressly allow for the award of interest. The court of appeals had determined that silence to mean that the plaintiff was not entitled to interest. *United States v. Seaboard Air Line Ry. Co.*, 280 F. 349, 354 (4th Cir. 1922). This Court reversed. 261 U.S. at 306. Noting that the measuring and awarding of just compensation are "judicial function[s]," and that the owner of condemned property is entitled to be "put in as good position pecuniarily as he would have been if his property had not been taken," *id.* at 304, the Court concluded that "just compensation" comprehensively includes all elements of property's value. Thus the Act's silence with regard to interest did not mean that the owner could be deprived of the value of compensation for a long period of time without being compensated for that delay. A property owner is

> not limited to the value of the property at the time of the taking; he is entitled to such addition as will produce the full equivalent of that value paid contemporaneously with the taking. Interest at a proper rate is a good measure by which to ascertain the amount so to be added.

Id. at 306.

To the same effect is *Phelps*, 274 U.S. at 343-44, a case in which the Court held that the plaintiffs were entitled to interest on the use value of their dock leases in New York Harbor. Because the plaintiffs had the right to receive the "full equivalent of the value of such use at the time of the taking paid contemporaneously with the taking," *id.* at 344, the compensation award would have to include interest "at a reasonable rate from the date of the use to the time of payment." *Id.* at 343.

Both *Seaboard Air Line* and *Phelps* predated the enactment of the Declaration of Taking Act, but this Court has reached the same conclusions since then. Indeed, in its more recent cases, this Court has made clear that the paramount consideration for assessing just compensation, and thus in determining the availability of interest, is the judicial identification of adequate compensation, not statutory qualifications. The *Jacobs* decision aptly illustrates this development.

In *Jacobs*, the petitioner sued for just compensation for the taking of an easement by flooding brought on by the government's construction of a dam. The court of appeals had determined that the petitioner was not entitled to interest because his claim arose under an implied contract, rather than the Fifth Amendment. *United States v. Jacobs*, 63 F.2d 326, 327 (5th Cir. 1933). This Court reversed, holding that the claim arose under the Fifth Amendment and emphasizing that the owner was entitled to "just compensation, not inadequate compensation." *Jacobs*, 290 U.S. at 16. Nowhere did the Court refer to the Act or its then-established six percent interest rate. Yet the Court interpreted *Seaboard Air Line* as holding "that the right to just compensation c[annot] be taken away by statute or be qualified by the omission of a provision for interest where such an allowance [i]s appropriate in order to make the compensation adequate." 290 U.S. at 17.

In *Shoshone Tribe*, the Court reaffirmed the implication in *Jacobs* that the right to adequate interest is an intrinsic aspect of the right to adequate compensation. There, the petitioner tribe sought compensation for the government's taking of its treaty rights through its reservation's occupation by Arapahoes. The tribe argued that because the Congressional enactment investing the Court of Claims with jurisdiction to hear the Shoshone Tribe's claims did not mention interest, such interest was not available. 299 U.S. at 484. The Court rejected that contention, concluding that the tribe's damages "include such additional amount beyond the value of its property rights when taken by the government as may be necessary to award of just compensation, the increment to be measured either by interest on the value" or by other appropriate means. *Id.* at 496. "[T]he right to interest," the Court concluded, "attaches itself automatically to the right to an award of damages." *Id.* at 497. Again, although the Court traced the tribe's right to interest to the government's obligation to pay just compensation, no mention was made of the Act.

Jacobs and *Shoshone Tribe* illustrate that the well-established proposition that Congress cannot dictate what shall constitute just compensation (because such a determination is a "judicial inquiry"), applies even in the context of disputes over interest. *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 327 (1893). *Accord*, *Seaboard Air Line*, 261 U.S. at 304. As this Court stated in *New River Collieries Co.*, "The ascertainment of compensation is a judicial function, and no power exists in any other department of the government to declare what the compensation shall be *or to prescribe any binding rule in that regard.*" 262 U.S. at 343-44 (emphasis added). Congress has no power to dictate to the federal judiciary what interest rate is to be applied in order to achieve the constitutionally mandated just compensation. Because the Sixth Circuit's decision below leads to a contrary

result, this Court should grant the petition to correct the lower court's error of law.

II

THE CONSEQUENCES OF THE GOVERNMENT'S ANNOUNCED INTENT TO USE EMINENT DOMAIN SHOULD NOT AFFECT THE AMOUNT OF "JUST COMPENSATION"

A. Mere Knowledge of a Pending Condemnation Cannot Deprive a Property Owner of Just Compensation

In the decision below, the court of appeals affirmed the district court's determination that the government's announced intention to take the subject property rendered the owners' development plans for the property untenable, and the value of those plans not compensable. *See Certain Land Situated in the City of Detroit*, 450 F.3d at 210. But this ruling runs counter to this Court's determination that the government's forewarning of a taking cannot be a basis for reducing its liability.

In *Palazzolo*, 533 U.S. 606, the Court held that a property owner's knowledge of the existence of a land use regulation prior to his acquisition of the property could not bar him from challenging the constitutionality of that regulation or seeking just compensation for it as a regulatory taking. *See id.* at 627 ("A State would be allowed, in effect, to put an expiration date on the Takings Clause. This ought not to be the rule. Future generations, too, have a right to challenge unreasonable limitations on the use and value of land."). *Palazzolo*'s rejection of the "notice rule" was based on the unfairness of allowing government to evade its duty to compensate merely by announcing its intentions in advance. As Justice Scalia explained, the "notice rule" allowed government to obtain windfalls through its own actions:

> [T]here is nothing to be said for giving [this windfall] to the *government*—which not only did not lose something it owned, but is both the *cause* of the miscarriage of "fairness" and the only one of the three parties involved in the miscarriage (government, naive original owner, and sharp real estate developer) which *acted unlawfully*—indeed *unconstitutionally*.

Id. at 636-37 (Scalia, J., concurring). Although this case does not involve an *unconstitutional* taking, the issue is similar: if foreknowledge of the pendency of a taking can bar the property owner from obtaining the compensation to which he or she is entitled, the government can obtain value from a property owner—measurable in money—through its mere announcement of intention.

Courts have often found that the government's announcement of its intention to take property, coupled with other steps toward condemnation, can constitute a taking of property even in the absence of a formal condemnation. *See, e.g., Maxey v. Redevelopment Auth. of Racine*, 288 N.W.2d 794, 802 (Wis. 1980); *Althaus v. United States*, 7 Cl. Ct. 688, 696-97 (Cl. Ct. 1985). This is because the effect on property values caused by such an announcement can amount to seizing the value of a piece of property.

The decision of the court below inverts the established understanding by allowing the government to appropriate such value without compensation. If, as the district court held, the government's announcement of its intentions rendered the owners' plans "unreasonable," *United States v. Certain Land Situated in the City of Detroit*, 188 F. Supp. 2d 747, 759 (E.D. Mich. 2002), then the government's mere statement of intention could transfer value—namely, the value of those plans—from the owner to the government without compensation. This is particularly egregious, given that government is generally free

to change its mind with regard to a proposed condemnation after announcing its intention. *Matsuda v. City & County of Honolulu*, 378 F. Supp. 2d 1249 (D. Haw. 2005); *Hsiung v. City & County of Honolulu*, 378 F. Supp. 2d 1258 (D. Haw. 2005) (Contracts Clause does not bar government from refraining from the use of eminent domain).

Assuming the government's announcement of its plan to take property renders the property owners' plans impossible, this is a measure of the value of which the owners were *deprived*, and therefore of the compensation which the owners are *due*—not a measure of noncompensable or speculative value. As this Court noted in *Olson v. United States*, 292 U.S. 246, 256 (1934):

> The fact that the most profitable use of a parcel can be made only in combination with other lands does not necessarily exclude that use from consideration if the possibility of combination is reasonably sufficient to affect market value. *Nor does the fact that it may be or is being acquired by eminent domain negative consideration of availability for use* in the public service.

(Emphasis added.)

B. This Case is an Important Opportunity for Ending Common Exploitation of Property Owners

Government naturally seeks to acquire property for the lowest possible price. But, unlike private market participants, it has the power to use coercive power to decrease the value of property targeted for condemnation. *See generally* Alan Romero, *Reducing Just Compensation for Anticipated Condemnations*, 21 J. Land Use & Envtl. L. 153 (2006). "Because of severe municipal budgetary restraints, coupled with heightened demands for increased public services and public

capital amenities, the temptation to engage in value-destroying gamesmanship confronts municipal offices around the country." William C. Leigh & Bruce W. Burton, *Predatory Governmental Zoning Practices and the Supreme Court's New Takings Clause Formulation: Timing, Value, and R.I.B.E.*, 1993 B.Y.U. L. Rev. 827, 829 (1993). Pre-condemnation depreciation allows the government to "solve" this problem by obtaining a windfall, and this Court has accordingly recognized that it is unjust to allow government to depreciate property values and then take advantage of this decrease by paying the lower value for the property. *United States v. Virginia Elec. & Power Co.*, 365 U.S. 624, 636 (1961); *City of New York v. Sage*, 239 U.S. 57, 61 (1915).

Unfortunately, experience reveals that governments are routinely exploiting their authority to affect property values in just this way. The government's announcement of its plans to use eminent domain generally has an immediate effect on property values in a given area. *See, e.g., Wash. Mkt. Enters. v. City of Trenton*, 343 A.2d 408, 414-15 (N.J. 1975):

> From the time it becomes generally known that an area has been selected as the site of an urban renewal project . . . there ceases to be a ready market for premises within the area. It becomes difficult to find tenants and impossible to enter into long-term leases. Upkeep, maintenance and renovation cease; the value of the property tends constantly to diminish.

Investors are unlikely to purchase property that is targeted for condemnation—and other investors are unlikely to invest in places nearby, given their colleagues' reticence. In addition, once government gains control of property, it sometimes uses that property in ways that decrease the value of other property that the government seeks to condemn. Thus an entire neighborhood's property values will be affected in ways that allow government to acquire property it desires for below

market rates (or at least that make it difficult to determine the actual value of the property). Economic scholars such as Frank Michelman refer to these costs as "demoralization costs." Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 Harv. L. Rev. 1165, 1214 (1967). Allowing government to realize such windfalls unjustly imposes costs on particular property owners that ought in all fairness and justice to be borne by the taxpayers as a whole. *VanHorne's Lessee v. Dorrance*, 2 U.S. (2 Dall.) 304, 310 (1795); *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

There are many reported instances of government using its authority in just this way. In *Kissinger v. City of Los Angeles*, 327 P.2d 10 (Cal. Ct. App. 1958), the court found that the city had rezoned the property owners' land as part of a concerted effort "to depress the value of the plaintiffs' property in order that it might be acquired for airport purposes." *Id.* at 16. This, the court found, violated the Due Process and Just Compensation Clauses. *Id.* at 15. *See also Maxey*, 288 N.W.2d at 801 (government denied business license as part of scheme to decrease property value for condemnation).

Other cases reveal even more startling examples. For example, in *Foster v. City of Detroit*, 254 F. Supp. 655 (E.D. Mich. 1966), *aff'd* 405 F.2d 138 (6th Cir. 1968), the court found that the city's actions encouraged the deterioration of a neighborhood targeted for urban renewal. Among other things, the city condemned and demolished several properties, and then maintained *lis pendens* liens on properties during a delay of several years, which impaired the sales of property and reduced property values. Meanwhile, it told remaining property owners that their property was targeted for condemnation soon. *Id.* at 662. The court determined that government may not deprive property owners of the just compensation to which they are entitled by "commencing a condemnation action, prolonging it while they encourage deterioration of the area by filing a lis

pendens, tearing down some buildings, ordering welfare tenants to move, etcetera, and then abandoning it and commencing new proceedings at which awards are based solely on value at that time." *Id.* at 663.

More recently, in *City of Toledo v. Kim's Auto & Truck Serv., Inc.*, No. L-02-1318, 2003 WL 22390102 (Ohio Ct. App. Oct. 17, 2003), *app. not allowed*, 804 N.E.2d 42 (Ohio 2004), *cert. denied* 125 S. Ct. 2988 (2005), property owners alleged that the city had consciously manipulated conditions in the surrounding area in order to maintain the presence of blight and permit a lower-cost acquisition of condemned property. *See* 2003 WL 22390102 at *2. The government condemned 29 structures, demolished 14 of them, and then failed to maintain the remaining 15. Vandals attacked the structures and other criminal activities reduced the neighborhood's property values. *Id.* Although the court determined that the area would have been blighted despite the government's malfeasance, the potential for abuse is obvious.[4] *See also Merkur Steel Supply, Inc. v. City of Detroit*, 680 N.W.2d 485, 494 (Mich. Ct. App. 2004), *app. denied* 688 N.W.2d 502 (Mich. 2004) (sufficient evidence supported claims that city had acted to diminish property owner's value so that city could acquire property for lower cost); *Richmond Elks Hall Ass'n v. Richmond Redevelopment Agency*, 561 F.2d 1327, 1331 (9th Cir. 1977); *Madison Realty Co. v. City of Detroit*, 315 F. Supp. 367, 371 (E.D. Mich. 1970) (city's actions had decreased the value by "permitting the decay to progress."); *Amen v. City of Dearborn*, 718 F.2d 789, 795 (6th Cir. 1983) (city acquired property, then failed to maintain it, even posting signs on some vacant houses

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[4] In the project at issue in *Kelo*, city officials immediately tore down the many homes and other buildings that they acquired in the redevelopment project area. As a result, Kelo and other remaining property owners found themselves surrounded by vacant lots, and the value of the entire area accordingly decreased.

reading, "Free at your risk, take any part of the house. First come, first served. Hurry.").

As this list indicates, government is in a unique position to serve its own interests at the expense of property owners. Gideon Kanner, *What to Do Until the Bulldozers Come? Precondemnation Planning for Landowners*, 27 Real Est. L.J. 47, 60 (1998) ("cities have been known to withhold trash pickup and police protection from the targeted areas . . . . [or cause] the targeted properties to fall into disrepair, so that cities can acquire them cheaply. Or, zoning may be changed so as to lower property values in anticipation of condemnation."). Given the broad authority to condemn which was authorized by this Court in *Kelo*, cities now have even greater incentive to engage in such abusive practices. Courts and commentators have recognized that rigorously ensuring that property owners are awarded the fair amount of just compensation is the only practicable means of preventing the over-use of eminent domain. *See, e.g.*, Joseph J. Lazzarotti, *Public Use or Public Abuse*, 68 UMKC L. Rev. 49, 70-73 (1999); Thomas W. Merrill, *The Economics of Public Use*, 72 Cornell L. Rev. 61, 84 (1986).

Since this Court's decision in *Kelo*, incidents of condemnation of private property for economic development have increased dramatically. *See* Dana Berliner, *Opening the Floodgates: Eminent Domain Abuse in a Post-Kelo World* 2 (2006)[5] ("there were 5,429 threatened condemnations for private use in the past year, as compared to 6,560 in the five years between 1998 and 2002."). This dramatic increase reveals the need for this Court's review in a case involving important issues of compensation. This case is an important opportunity for the Court to clarify that the valuation of condemned property must be independent of considerations of

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[5] *Available at* http://www.castlecoalition.org/pdf/publications/floodgates-report.pdf (last viewed Feb. 1, 2007).

the government's own actions, and that government may not take advantage of its own condemnation decision to impose increased costs on those who are losing their property through condemnation.

CONCLUSION

The petition for a writ of certiorari should be *granted*.

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Respectfully submitted,

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